INTRODUCTORY NOTE

Sovereignty, as used in constitutional and in international law, may be considered a technical word or expression, and therefore within the province of the student or the scholar.

The extent, however, to which sovereignty has been, and still is, discussed in reference to international organization takes it from the exclusive domain of the student or the scholar and obliges the layman to become familiar with its origin and nature. It has become a question of the day.

We should, therefore, be grateful to Mr. Lansing, who has allowed his *Notes on Sovereignty* to be issued in handy form, where the student and the scholar, as well as the layman, may read and ponder them without being obliged to consult *The American Journal of International Law*, in which three of the four papers originally appeared, or the *Proceedings of the American Political Science Association*, in which the fourth was printed for the first time.

"We must educate our masters," as The Right Honorable Robert Lowe is reported to have said in Parliament, on the extension of suffrage by the Second Reform Bill. We must, indeed, educate our masters, when every man and woman possesses the right of suffrage, and the power to influence the foreign policy of these United States.

These *Notes on Sovereignty*, less than a hundred pages, are calculated to do this very thing, and it is to be hoped that in their present form they will reach a larger circle of readers than in the technical periodicals in which they first saw the light of day.

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WASHINGTON, D. C.,
April 1, 1921.

CONTENTS

NOTES ON SOVEREIGNTY IN A STATE

First Paper [1]

The following notes aim, in a tentative way, to discuss and analyze the source and nature of sovereignty in its relation to mankind, and to the institutions created and developed as a result of man's desire for social order and peace. The term notes excludes the idea of an exhaustive or comprehensive treatment of sovereignty; the sole purpose in view is to direct attention to the wide-reaching importance of the subject and to suggest a line of thought somewhat different from that usually followed by publicists.

INTRODUCTORY

In the various systems of philosophical theories of government, which have been given to the world since the human reason was emancipated by the revival of learning, sovereignty, with scarcely an exception, has held a prominent place, and upon their conception of it all of the foremost thinkers since that time have rested their philosophic systems. The two great exceptions to this general practice are Montesquieu and Locke. The former neither defines nor treats of sovereignty: and the latter fails even to mention the word. The explanation of this apparently vital omission from their systems may be found in the ethical idealism of these philosophers, who exalted moral obligation to an actual force and gave to man's consciousness of right a determinate authority which is denied by historical experience. They dealt with what they conceived *ought to be* in human affairs, rather than what really is.

The other political philosophers preceding Locke, and Mont-

[1] Reprinted from *The American Journal of International Law*, vol. i (1907), p. 105–128. The following works, referred to by author rather than title are: Austin, *Lectures on Jurisprudence*, 5th ed., revised and edited by Robert Campbell, London, 1885. Bluntschli, *The Theory of the State*, 3d ed., Oxford, 1895. Burgess, *Political Science and Comparative Constitutional Law*, 2 vols., Boston, 1890–1891. Dunning, *A History of Political Theories*, New York, 1905. Lawrence, *The Principles of International Law*, 3d ed., Boston, 1900. Maine, *Lectures on the Early History of Institutions*, London, 1875.

esquieu such men as Jean Bodin, Suarez, Johannes Althusius, Hobbes and Spinoza, while often intermingling abstract right with strict legality, saw the necessity of recognizing sovereignty as an ever present factor in all phenomena of government, and, therefore, of introducing it into their systems. When Hume by the force of his logic discredited the "contract" theory of the source of governmental power which had swayed philosophic thought for a century and set in motion those doctrines that found fuller expression in the writings of Bentham and Austin, sovereignty again assumed the importance which it had in a measure lost through the influence of Locke and Montesquieu.[1]

To modern writers upon political philosophy, jurisprudence and law the subject of sovereignty has been one of recognized importance. Indeed, it has been to the great body of philosophic thought for the past three hundred years the persistent force which affects all the political relations of mankind. To the present-day philosopher, it is even more; it is the fundamental authority which controls, restrains and protects man as a member of society. In the advanced state of modern thought, it is irrational to consider origins or to trace the development of political institutions without admitting the existence and constant activity of sovereignty, and its potency in the creation, evolution, and expansion of such institutions. No problem of government can be proposed in which it is not an essential factor. No explanation of such terms as *liberty* and *law* satisfies the reason or appeals to man's consciousness of truth which does not introduce, define, and apply sovereignty.

The organization of a political society without the operation of sovereignty is as incomprehensible as a creation without a creator, as a thought without the mind from which it sprung. Sovereignty, like that energy which is called electricity and seems to be omnipresent in nature, permeates every political institution and every social organism, however crude and rudimentary, or however complex and highly developed they may be.

[1] It is true that Austin relegated the discussion of it to the closing chapters of his work on the Province of Jurisprudence, but for this he is criticised by Sir Henry Maine, who supposes this illogical method to be the result of Austin's antipathy to anything which seemed to be in accord with Blackstone.

Before entering upon an analysis of the subject it is needful to define *sovereignty* as well as certain other terms which will be used. Definition is always difficult and often unsatisfactory. So much depends upon *how* a word is used that it is not uncommon to find a course of reasoning and even an entire system of philosophy turn upon the meaning of a single word. To anyone, who appreciates the value of accurate definition and the liability to err through an incomplete grasp of the subject or through the influence of a preconceived line of argument or through imperfect operation of the reason, the attempt to define cannot be made without great caution, and the claim to correctness without hesitation. The failure of many an attractive philosophical theory may be charged to the self-sufficiency of the theorist in defining the terms which he employs. Nevertheless, words must be defined, especially when used technically; and, though there may not be universal agreement as to the accuracy of the definitions, they will form subjects of further discussion, and, even if incomplete or faulty, will disclose the basis upon which an argument rests.

Bearing in mind then the difficulties as well as the necessity of definition the writer defines sovereignty in its broadest sense as the *power to do all things without accountability.*

So extensive a power, which eliminates the elements of time and space, of motion and inertia, of mind and matter, can only find a counterpart in a super-mundane and super-human sovereignty which is coextensive with the limitless universe and which can only be possessed by an Omnipotent and Eternal Being. Sovereignty in the abstract is, therefore, coincident with *Divine Sovereignty.* It is not intended in these notes to enter that great sphere of thought which embraces the philosophy of religion and kindred subjects, but to deal with that type of sovereignty, which in contrast to the super-mundane and Divine, may be called *human sovereignty or world sovereignty.*

Such sovereignty may be defined as *the power to the extent of human capacity to do all things on the earth without accountability.* Even thus limited to the earth and to mankind, sovereignty is too comprehensive and, in a sense, too intangible to yield readily to

analysis or to furnish historical illustration. It is proposed, therefore, in these notes to consider a more circumscribed type, which will be perceived in familiar phenomena, and be more fruitful of example. This lesser sovereignty is that which prevails in a state. It is the sovereignty which history knows and law recognizes, the sovereignty which affects the individual members of states, and which is the force constantly at work forming and reforming political institutions and regulating human conduct.

Before proceeding it is necessary to reach some basic idea of a state; and for a satisfactory definition the one given by Burgess may be adopted, provided it is not limited to a "modern state," but is applied to a state generally. The definition, which is concise and comprehensive, is as follows: "*The state is a particular portion of mankind viewed as an organized unit.*"[1] The definitions of the American jurists, Story and Cooley, are more elaborate but convey the same idea of unity and organization. Story says that a state is

> a self-sufficient body of persons united together in one community for the defense of their rights and to do right and justice to foreigners. In this sense the state means the whole people united into a *body politic*, and the state, the people of the state, are equivalent expressions. (Story on the Constitution.)

Cooley defines a state as

> a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.[2]

The criticism of the last two definitions is that they assert definitely a *reason* for the union, which may seem to some open to objection or at least to question. However, if the definitions stopped here, there would be little disagreement, but they do not. Publicists have seen fit to expand their concepts of the state by declaring that they must possess particular qualifications

[1] Burgess, vol. i, p. 51.
[2] Cooley, *Constitutional Limitations*, p. 1.

which sometimes lead to paradoxes and contradictions. these required qualifications the most general are that ganized community to be a state must have a fixed ter abode and that it must consist of a large number of persons. Undoubtedly these are characteristics of most modern states; but to admit this limitation would deprive a large number of independent communities of a name to which they appear to be entitled by the completeness of their political organization and the influence which they have exerted upon the world's history.

It must be recognized that the word "state" from its derivation carries the idea of fixity of abode; but there should be a careful distinction made in the use of the word in its application to persons and to territory. In the consideration of sovereignty, the state as an organized community of individuals is of importance. In fact, the qualification of occupation of territory is for the purpose of these notes non-essential; and its omission from the definition avoids controversy as to the correctness of the limitation which its adoption would impose.

The same objection applies to the requirement as to numbers. When it is said that a community in order to be a state must be composed of "a large number of persons," one naturally asks, *how* large a number? If the number is not definite, who is to fix it? Some philosophers say "a considerable number";[1] others,

[1] Austin says: "In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute." Austin, p. 231. He goes on from this to argue that though an "insulated family" of savages is an independent society, of which the father as chief receives "habitual obedience" from the rest, to call the family "a society *political* and independent" and the father "a *monarch* or *sovereign*" would "somewhat smack of the ridiculous."

Maine, in considering this argument of Austin's, points out the "seriousness of the admission" that the theory cannot be applied to a family. Maine, p. 379.

Lawrence, who appears to favor the Austinian theories, says: "A state may be defined as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey. This central authority may be vested in an individual or a body of individuals; and, though it may be patriarchal, it must be something more than parental; for a family as such is not a political community and therefore not a state." Lawrence, p. 56.

ıltitude"; but, if Coke is correct, "*Multitudinem decem* '" (First Institute). Rousseau declared one hundred nd was enough, but Bluntschli rejects it as insufficient. ... is utter confusion, disagreement and vagueness. If a definition is of any value it must have some measure of certainty, but this feature of numbers is decidedly uncertain. It is far better to take the position of Jean Bodin and declare all discussions as to numerical limits to be irrelevant.[1]

It seems more reasonable, therefore, and for present purposes it is sufficient, to adopt the less complex definition, upon which there is substantial agreement, and assume that, when a portion of mankind is united into a community and becomes an organized unit, it is a state.

However, to avoid misunderstanding it will be well to distinguish between the uses of the word in terms. The community of human beings will be called the *political state;* the territory, which they possess, the *territorial state.* When the word "state" is used without either adjective, the political state is intended.

It should also be noted that the words "state" and "nation" are frequently used interchangeably. The word *nation* carries with it an idea of racial and, generally, linguistic characteristics which the word state does not. Today most states, particularly the large and powerful ones, are correctly called nations; and, while the difference between the words is recognized, they will be often used in these notes as synonyms in accordance with common usage.

Having thus defined the general terms which will be employed in the succeeding pages, a foundation is laid for the consideration of the specific subject of sovereignty in a state.

SOVEREIGNTY IN A STATE

Applying the definitions given in the introductory note, of divine and human sovereignty to the sovereignty in a state, the latter would be *the power to the extent of the natural capacity of the*

[1] Dunning, p. 90.

possessor to do all things in a state without accountability.[1] From this definition the following deductions are drawn:

1. Sovereignty is *real* (or *actual*) only when the possessor can compel the obedience to the sovereign will of every individual composing the political state and within the territorial state.

2. Such complete power to compel obedience necessarily arises from the possession of *physical force superior* to any other such force in the state.

3. The exercise of sovereignty in a state does not involve reasonableness, justice, or morality, but is simply the application or the menace of *brute force*. Regard for rational, equitable, and ethical ideas may, and in modern states usually does, limit sovereign acts, but the acceptance of such ideas as rules of action is discretionary and not actually compulsive. All such influences being followed only voluntarily by the possessor of the sovereignty and operating by permission rather than by positive power, obedience to them does not determine the possession of the real sovereignty.

The definitions which have been given of sovereignty by accepted authorities in the fields of jurisprudence and political science do not contradict the one given above. A few quotations will suffice.

Wheaton says:

> Sovereignty is the supreme power by which any State is governed.[2]

Story defines sovereignty as

> the union and exercise of all human power possessed in a state; it is the combination of all power; it is the power to do

[1] Maine thus interprets Austin's definition of sovereignty: "There is, in every independent political community—that is, in every political community not in the habit of obedience to a superior above itself—some single person or some combination of persons which has the power of compelling the other members of the community to do exactly as it pleases. This single person or group—this individual or this collegiate Sovereign (to employ Austin's phrase)—may be found in every independent political community as certainly as the centre of gravity in a mass of matter." Maine, p. 349.

[2] Wheaton, *Elements of International Law*, 6th ed., Boston, 1855, p. 29.

everything in a state without accountability. (Story on the Constitution.)

Burgess says:

> I understand by it [sovereignty] original, absolute, unlimited, universal power over the individual subject and over all associations of subjects.[1]

The notable thing is that in all these definitions sovereignty is termed a "power," namely, "supreme power," "all human power," and "universal power." Now the only *actual* power known in human society is physical. However religious and moral instincts may affect human action, the physical is the power that compels, including in the term the ability to effectively exert it.

Therefore, if sovereignty is the supreme coercive power in a state, it must rest upon material force without regard to the righteousness of its exercise.

While the existence of sovereignty rests upon the possession of superior physical strength, its exercise must depend upon an operation of the will of the possessor; but because there is no such mental operation is no ground for denying the existence of the sovereignty. In fact it is impossible to conceive of a human community, whether organized or unorganized, in which there is not superior physical strength resident in an individual or a collection of individuals, and where this superiority of strength resides there is the sovereignty (even if it is never exercised) and its possessor is the sovereign.

In view of the physical nature of sovereignty the following assertion of Bluntschli cannot be accepted without material modification. He says:

> It is illogical to consider Sovereignty as the source of the State and of Law, and to put the Sovereign above the State. . . . Thus Sovereignty is a conception of Public Law, and not superior to it.[2]

[1] Burgess, vol. i, p. 52.

[2] Bluntschli, p. 496, note.

In the first place such a statement manifestly excludes all consideration of divine sovereignty or world sovereignty, for which reason, if for no other, it would be objectionable. But further, the characteristics of a state are union and organization, the union and organization of the individuals composing a community, each of whom possesses a certain measure of physical power. These individual powers must have existed *en masse* prior to the union and organization of those possessing them; and, therefore, the collective power of the community must have existed from the time that the community came into being; and, if it did, this power was present before the state came into existence as an organized unit. It makes no difference by what name it is known, the superior power of the community existed in the community identical in its characteristics with the power which Bluntschli declines to term sovereignty until the state is formed and law is operative. Now, it is evident that there can be no act of union and organization without the consent of the possessor of this superior power; and, therefore, the act of organizing a state is an exercise of the will of the possessor. To distinguish this power by different names before and after a state is organized is a mere quibble in nomenclature, which can serve no good purpose.

Take another quotation from the same writer, in which he expresses an idea, which was advanced by the French philosopher, Jean Bodin, two hundred and fifty years before Bluntschli wrote:

> Without force a State can neither come into being nor continue.[1]

What is this "force"? Bluntschli calls it sovereignty *after* the state is organized, that is, when it is the continuing force. Why then is it not sovereignty when it is the creative force? What other appropriate name can be given to it? Since the force that brings a state into existence is identical with the force that continues it, it is rational to term it under all circumstances sovereignty. What certain publicists have tried to avoid and

[1] Bluntschli, p. 293.

what they cannot avoid is that sovereignty and the sovereign existed before the state.

This is particularly true of those who maintain that sovereignty rests in the state alone as a living organism, that is, that the state and the sovereign are identical; as well as of the other class who confuse the sovereign and the government. To the former theorists the state is necessarily pre-existent to sovereignty. To the latter, the state must have been before the government and, therefore, before the sovereign. The result is that both schools are forced to assume positions which are unnatural, and to advance propositions which, though advocated with ingenious logic, are unsupported by historical facts.

As an example of the confusion caused by attempting to maintain that the state is the sovereign, place in contrast two quotations from Burgess' work. First,

> the state is a particular portion of mankind viewed as an organized unit.[1]

Second, referring to the granting of Magna Charta,

> the aristocracy seized the sovereign power, became the state, whereas, before this, the King had held the sovereign power, had been the state as well as the government.[2]

Here is evidently contradiction, unless the writer views Plantagenet England as some other type of state from the one defined. The state, composed of "a particular portion of mankind," is forced into the narrow compass of a *single individual*, the king, or of a small group, the aristocracy. What becomes of the thousands of persons outside of the few? Are they not members of the state? If they are, how can the state be the sovereign? The position is paradoxical, and the theory is irrational. But separate the state and the sovereign; make the former the field of operation, and the latter, the operator; then the state and the sovereign will take separate places logically consistent, and their relations will be entirely harmonious though interdependent.

[1] Burgess, vol. i, p. 51.
[2] *Ibid.*, p. 92.

This relation of the sovereign to the state and of sovereignty to the state may be more clearly brought out by studying it in the rudimentary institutions which existed in primitive communities and still exist among the savage races of today. Whether these communities were or are entitled to the name "state" is unessential; the necessary premises are the existence of a community and the presence of a superior physical force which can compel complete obedience from all persons in the community. These two facts are for the present sufficient.

In the formative period of human society, when man was little better than a beast, the strongest individual in a community overcoming his fellows in combat or causing them to fear his superior strength compelled obedience to his will. He was a master, a despot, and the small group, of which he formed a part, was forced to submit to his will. It has a likeness to the leadership among gregarious animals, and doubtless had its origin in the same sexual instinct which impels the rivals of a herd to battle for the mastery;[1] but there is this distinction, in the case of man, skill and sagacity in the use of physical strength are important factors in determining its applied value. This was the first step in the direction of political organization, a rudimentary exercise of that control in a community, which becoming established by long-continued usage, develops into definite governmental form. While the idea of chieftainship thus became fixed in primitive societies, and the advantages of submitting to a political and military leader were made apparent by experience, it is manifest that the individual, who was recognized as the chieftain, did not, except in an extremely small community, possess in himself the physical power to enforce his will against the combined opposition of other members of the community. The real sovereignty, therefore, could only in a very small and insignificant community be possessed by a single individual. Nevertheless this species

[1] Professor Boughton in his History of Ancient Peoples (New York, 1897) says: 'Primeval men were only gregarious, there was no government—might made right. There was no family—physical strength was man's title to woman's love. The ties of parentage were instinctively felt and it was along the line of kinship that society at last became organised into the Tribe."

of political organization under a warrior chief, who exercised sovereign authority through the voluntary submission of the members of the community, or through the submission of those members who collectively were predominant in strength and prowess, naturally developed, as communities increased in size, becoming a definite and universal political type. As might be expected, therefore, and as is actually the case, the beginnings of history find communities, tribes, and peoples ruled by absolute kings, or rather chieftains, who in subsequent ages became the heroes and demi-gods of national legend, possessing marvelous physical endowments, unsurpassed valor, and supernatural strength. Such was Agamemnon among the Greeks, Romulus among the Romans, and the hero kings of the Norse sagas. These great warrior chieftains exercised the sovereignty over the communities in which they lived, exercised it and maintained it by their personal prowess, aided by those who voluntarily acknowledged their leadership.[1]

Women, physically inferior to men, were never able in the barbarous period to successfully contend for the mastery. They were always, with a few exceptions, subject to the sex to which nature had given superior strength. That inherent weakness of woman is still recognized in the states of the world, and the possession of sovereignty is deemed today a masculine prerogative just as it has been for thousands of years.

In the primitive state of society the death of the chieftain either precipitated a combat among rival leaders and factions in the community, or else the ability and physical superiority of one warrior caused all to submit to his control. In either event the one, presumptively the most powerful and skillful, succeeded to the exercise of the sovereignty. But with the establishment of the family relation, the institution of property, and the increasing

[1] Professor Dunning thus states the idea of Jean Bodin (1580) in regard to primitive government: "While human society thus arose through the operation of the social instinct, the state, on the other hand, took its origin in force. . . . The view of Aristotle and others, following Herodotus, that the first monarchs were voluntarily chosen by the peoples for their supereminent virtues, is, Bodin holds, wrong; history shows that they were military leaders who imposed their sway upon the peoples by force." Dunning, p. 89.

influence of habit, custom, and acknowledged privilege, the right to exercise sovereign authority came by a natural process to be viewed as a proper subject of property, to which the principles of transmission could be applied. By those principles the right to exercise sovereignty became fixed as a legal right, and like other subjects of property passed by descent or was transferred by gift or purchase. Thus sovereign authority was commonly treated as hereditary, descending from father to son.

This method of succession was not the natural one found in the primitive community; but was purely artificial unless the new ruler actually possessed the brute force and martial skill with which he could cause all members of the community to submit to his will. If he failed in this, the authority which he possessed lacked the essential of real sovereignty, *the physical strength to compel obedience*. It is at this stage in political development that the theory of the "social compact" or the later theory of "habitual obedience" may be logically invoked as the basis of sovereign authority, but, whichever theory is accepted, it must be understood that the authority established is not that of the *real*, but of the *artificial sovereign*.[1]

REAL AND ARTIFICIAL SOVEREIGNTY

As in time communities became united with other communities forming large political societies, of which the members were numbered by thousands instead of by scores, the chief of each of

[1] "*Artificial.*" It should be understood that the adjective "*artificial*," used to describe a sovereign and sovereignty of a particular type, does not have its primary meaning of "made by art," "constructed," but is used in its derivative and secondary sense of "assumed," "not actual." The sovereign and sovereignty, to which it is applied, are in contrast to "*real* sovereign" and *real* sovereignty; that is, although such sovereign and such sovereignty may be apparently real, generally recognized as real, and operating and operative as if they are real, they are none the less unreal and liable to be divested of their apparent reality by the real sovereign through the exercise of real sovereignty. It is manifest that the word "*artificial*," even in its secondary sense, does not in itself describe precisely the sovereign and the sovereignty intended; in fact, no English adjective meets all the requirements; hence it is necessary to explain the special meaning with which the word is used in these notes, and that it is adopted in preference to any other because it more nearly expresses the idea which it is desired to convey.

these greater societies could never by his own personal strength enforce his will. Did he, under such circumstances, possess the sovereignty of the state over which he was the acknowledged ruler? In one sense, yes; in another, no. He held an *apparent* sovereignty, which habit, custom and usage sanctioned and clothed with all the outward indices of sovereign power; but for all its outward evidence of sovereignty it was none the less *artificial.* The *real* sovereign was the individual or body of individuals in the state possessing the physical strength which, if exerted, could compel obedience. It matters not that the stronger, under the influence of habit or custom, voluntarily submitted to the weaker, the latter in reality gained thereby no more actual strength, and the former involuntarily retained the power to coerce the ruler and all other members of the state. Thus the ruler could only exercise the prerogative of sovereignty at the pleasure of the real sovereign.[1] This establishes the following proposition (one reached by Rousseau through an entirely different line of reasoning, since his is based on natural rights rather than on physical force): *The real sovereign cannot divest himself of his sovereignty nor can he be divested of it and exist.*

[1] The theory of Johannes Althusius as to the relation of rulers to the sovereignty is thus stated by Professor Dunning: "Sovereignty (*maiestas*) is defined as the supreme and supereminent power of doing what pertains to the spiritual and bodily welfare of the members of the state. This power inheres, by the very nature of the association, in the people—the totality, that is of the members of the state. . . . But, for the purpose of carrying out the functions of the state, duties may be distributed among agents of the sovereign, and it is in this capacity alone that kings and magistrates exercise authority. These functionaries, whatever their power and jurisdiction in reference to the individuals, are by the very nature of the case themselves subject to the people as a whole. . . . Sovereign power, therefore, when properly understood, cannot conceivably be vested in any individual or group of individuals less than the whole people. It cannot be alienated or delegated to any one by the people; . . . so long as there is a people it must possess sovereignty." Dunning, p. 63.

It should be remembered in reading this analysis of the German philosopher's theory that his system rested upon the idea that the state was founded on a "social contract" between the persons who composed it. He carries out this contractual relation in the organization of governments. "The king is the executive of the people . . . His relation to the people is that of agent (*mandatarius*), and a contract between him and the people is perfected through his choice and coronation. He undertakes to govern in conformity to the fundamental law of the land, and they agree to obey him." *Ibid.*, p. 65.

This distinction between an artificial sovereign and a real sovereign has not been recognized in terms by publicists, though the idea has been imperfectly advanced by some. Bluntschli, for example, says:

> Besides the sovereignty of the entire nation, there is another within the State, the sovereignty of the highest member, the chief, the rulers, or, since it is most clearly seen in monarchy, the sovereignty of the prince. . . .
>
> The sovereignty of the State and the sovereignty of the prince are not in contradiction. There does not result a division of sovereignty, as if the one half belonged to the people and the other to the prince: there are not two jealous powers striving for supremacy. Both imply unity and plenitude of power; but it is clear that the whole, including the head, is superior to the head alone.[1]

Here is evidently the recognition of two sorts of sovereignty in a state, one of which is superior to the other. Yet both are assumed to be real, and there is an attempt (although the line of argument is not at all clear) to explain how they can exist harmoniously; in other words, to show that two *supreme* powers can operate without contest in the same sphere and both remain supreme. While the very idea is a contradiction, this contradiction immediately disappears if one sovereignty is seen to be real and the other only artificial.

It is needless to cite the explanations of other writers, who have found the same difficulties with the facts that were found by Bluntschli, and whose arguments are equally unsatisfactory and vague.

It was this artificial type of sovereignty that from the earliest civilized governments to the rise of the free cities of Germany in the eleventh and twelfth centuries existed in nearly every European state; a notable exception being the popular sovereignty of the early Teutons, whose system of electing their kings later developed into the political institution of an elective monarchy. This artificial sovereignty exists at the present day to a more or less degree in modern states with monarchial forms of govern-

[1] Bluntschli, pp. 503–504.

ment. Nevertheless, the real sovereignty is not destroyed. *It never can be.* Since the eleventh century the real sovereign has gradually compelled recognition, until today in the more enlightened states the possessor of the real and not the possessor of the artificial sovereignty is recognized as dominant; as the actual source of political authority in a state.

The political history of England presents a familiar and at the same time a very clear illustration of this progression from the domination of the artificial sovereign to the domination of the real sovereign. During the early Norman period, when the feudal system prevailed, the king was deemed to be the sole possessor of sovereign rights, though in fact the royal power depended for its exercise upon the will of the nobility. With them was the actual strength of arm to compel obedience within the state. The lower classes, ignorant, depraved, and unorganized, were both mentally and physically inferior to their feudal lords, whose knightly valor and skill at arms held their vassals in abject subjection, compelling them to obedience by force or by the fear of their lord's displeasure.

When, therefore, King John submitted against his will to the demands of his rebellious barons at Runnymede and granted certain rights and privileges to his subjects by Magna Charta, he did not perform a sovereign act. The act of real sovereignty was that of the nobles in compelling John to append his signature and affix the royal seal to the famous instrument. As Bacon says: "*Potestas suprema seipsum . . . ligare non potest.*" (Maxims, 19.) The supreme power—that is, the real sovereignty—cannot bind itself, nor can it be bound by another, otherwise it would lose its supremacy and its reality.[1] To revert again to a quotation, previously given in another connection, which relates to this prominent event in English history, "the aristocracy seized the sovereign power, became the state."[2] While this statement is not literally true, since the aristocracy exerted a power they already possessed, the same thought is there ex-

[1] "Supreme power limited by positive law, is a flat contradiction in terms." Austin, p. 263.

[2] Burgess, vol. i, p. 92.

pressed, especially when it is remembered that the writer declares the state to be the possessor of the sovereignty.

A half century later, Henry III and his son were captives of the insurgent army of Simon de Montfort. During those fifty years the social condition of the common people had rapidly improved, and particularly so in the cities under the civilizing influence of trade, commerce, and the exercise of their charter liberties. That the popular masses were beginning to realize the power of cooperation and organization was manifested in their merchant and trade guilds and in their trained bands of soldiery. Their strength had been demonstrated in the civil turmoils of the period, and it was recognized by the dominant nobility when borough representatives were given seats in the first Parliament. Thus the real sovereignty of England was shared in undetermined proportion by the lords and commons.

With the increase of learning among the middle and lower classes and with a growing reliance upon their own power resulting from military experience, the commons dared at length to resent and oppose the arrogance of the nobility. The crown, taking advantage of these dissensions, gained by apparent concessions the support of the common people, and upon their physical strength rested the royal authority, the artificial sovereignty. Thus, while the real sovereignty was not actually put to the test, events show that the preponderance of physical might was with the people in contradistinction to the aristocratic class.

The same state of facts is noted by Professor Burgess, though he uses in accordance with his theory the words "state" and "sovereign" as equivalents. After reciting the coalition between the king and the commons against the aristocracy, he says:

> In the organization which followed, called in political history the absolute monarchy of the Tudors, the people were, in reality, the sovereign, the state, but, apparently, the King was the state. England under the Tudors was a democratic political society under monarchic government.[1]

This assertion of power, but partially realized by its possessors,

[1] Burgess, vol. i, p. 93.

was largely due to the invention of gunpowder. Gunpowder destroyed chivalry for it made the yeoman equal in destructive ability to the knight, whose training and martial skill had so long given him the ascendency. Gunpowder, like discipline, added a new factor in determining the physical might which is the essential of real sovereignty. Numbers, organization, equipment, and practice in the use of firearms became the measure of strength rather than personal valor and individual muscular development.[1]

The people of England were long in appreciating the effect of the new destructive and their possession of superior power; but at last, goaded to action by the folly and obstinacy of Charles Stuart, they threw off the yoke of artificial sovereignty, and, by compelling obedience to their will, demonstrated the location of the real sovereignty. Since the execution of Charles I, the English people have known that they were sovereign in England. The revolution of 1688 and the peaceful revolution of 1832 are but cumulative evidence of the fact. The sovereignty of an English king, resting solely upon the will of his so-called subjects, is not real but artificial, a fiction perpetuated by custom, by reverence for the past, and, if you please, by the "habit of obedience" which Hume and Austin have made so prominent. The king, the monarch, cannot by his own might compel obedience; the *sovereign people* can.

However certain may be the nature of real sovereignty and its presence in a state, it is the artificial which has for the past three hundred years been emphasized in the majority of governmental systems through the passive acquiescence of the real sovereign;

[1] Maine, in his consideration of how far the facts of human nature and society bear out the Austinian idea regarding sovereignty, says: "The first of them is that, in every independent community of men, there resides the power of acting with irresistible force on the several members of that community. This may be accepted as actual fact. If all the members of the community had equal physical strength and were unarmed, the power would be a mere result from the superiority of numbers; but, as a matter of fact, various causes, of which much the most important have been the superior physical strength and the superior armament of portions of the community have conferred on numerical minorities the power of applying irresistible pressure to the individuals who make up the community as a whole." Maine, p. 357.

and it has been the treatment of the artificial as if it were the real that has weakened many philosophic theories and made them valueless in explaining certain important historical events. It is only in the case of great political or social upheavals in a state, when actual physical force is exercised, that the possessors of the real sovereignty arise in their true character and assert their supremacy. Such momentous events in the world's history, as the rebellion of the Netherlands against Spain, the English revolution of 1688, the American war for independence in 1776, and the French revolution of 1789, are manifestations of the real sovereignty.

Yet, having demonstrated its superiority and compelled obedience to its will, the real sovereign does not always establish a government consonant with its expressed authority; but, influenced by custom, inclination or expediency it permits an artificial sovereignty to continue though it may materially modify its form and limit its exercise from that which had previously existed. In the case of the revolting English colonies in America this was not so; but in England, after the dethronement of James II, the monarchy with its artificial sovereignty was restored though with restricted powers. The same was true of France after it had passed through a chaotic period, in which the sovereignty was the plaything of mobs, and through the feverish glory of the Napoleonic era. There are features which make the epoch of the French revolution unique in history, particularly the advent of Bonaparte and the influence of his extraordinary personality upon the republicanism and materialism of the French nation; but this is not the place to give to these phenomena the special consideration to which they are entitled. Suffice it to say, that with the final overthrow of Napoleon, the Bourbons were again permitted to assume their artificial sovereignty, and the real sovereignty of the French people became latent. But the spirit of the revolution was not extinguished, and, though it smouldered for a time, it broke forth again and again until the artificial sovereignty of the houses of Bourbon, Orleans, and of Bonaparte was finally consumed in the conflagration of the Paris Commune.

Successful popular revolutions and the suppression of rebel-

lions are the manifestations of the real sovereignty in a state. Both are coercive in character, both compel obedience, and both require the exercise of superior physical strength, including in that term the use of weapons of war, military skill, discipline and equipment.

REAL SOVEREIGNTY IN TIMES OF PEACE

The actual expression of the real sovereignty occurs, as has been shown, in times of civil turmoil, but it cannot find expression, when domestic peace prevails, through the medium of physical force. The fact that the force is present and that it is supreme within the state is sufficient to cause recognition. Under peaceful conditions the acts performed *directly* by the real sovereign are limited to the following: (1) The establishment of a government; (2) the delegation of powers to that government; (3) the granting of civil liberty to members of the state; (4) the changing of any provisions relating to the first three subjects; (5) the appointment of governmental agents; and (6) the enactment of certain laws. The three first acts are accomplished by adopting or consenting to a constitution for the state; the fourth, by amending such constitution; the fifth, by election; and the sixth, by the processes known as *initiative* and *referendum*.

It makes no difference *how* a constitution or a constitutional amendment is introduced, its binding force is derived from its positive or passive adoption by the real sovereign. But this binding force only applies to the individuals in the state considered as distinct units. It cannot bind the individuals considered collectively as a single body or that undetermined portion which possesses the superior physical force in the state. That dominant portion is the sovereign, and the sovereign cannot bind itself or be bound. In a Christian state, just and moral principles usually control the majority of individuals in the exercise of the share of the sovereignty, which each possesses as a member of the sovereign body, but only because of the prevalence of religious sentiment and of the consciousness of moral obligation. The body of individuals in a state, in which body resides

the real sovereignty, is not restrained in any way, except by the limitations inherent in human nature, in declaring the fundamental law of the state. They may, indeed, if they so will, embody in a constitution provisions which are manifestly unjust and immoral. It is not at all a question of right, but a question of power. Yet there must be no confusion of the right and the power. Might may make law, but might does not make right. The sovereign is supreme, but the sovereign may be unrighteous.

As it is impossible, except when actual physical strife occurs in a state, to determine with certainty who are and who are not the possessors of the real sovereignty, there are certain qualifications which have been assumed in modern states to be evidence of an individual's right to share in the exercise of the sovereignty.

These qualifications are usually based, whether intentionally or not, upon the *presumptive physical strength* of the individual. They are as follows: *First*, Sovereign rights are confined to *males*, because, as has been pointed out, females are physically inferior and therefore powerless to maintain such rights by force. *Second*, The males are also limited to those who are presumed to have attained full bodily vigor, which is assumed to be when they have reached a certain age. These two requirements rest upon the natural attribute of sovereignty, strength. But property and educational qualifications are purely artificial limitations based upon the desire to restrict the exercise of sovereignty to those who will be influenced by reason, conscience, and patriotism in giving expression to the sovereign authority.

As assumption takes the place of physical demonstration in times of domestic peace, the test for possession of the sovereignty is not physical but must rest upon a fulfilment of the qualifications imposed. Whatever may be the difference between two persons in physical vigor if each meets the requirements laid down for sharing in the sovereignty, they are deemed to be equal in their possessive right in such sovereignty. It is clearly an assumed equality based upon assumed evidences of strength, and in some cases of intellectual ability, but such assumptions are inseparable from the internal peace of a state. Any other method would introduce confusion and conflict, and would, there-

fore, be irrational since it would bring about a condition hostile to progress and the common weal. Furthermore, this assumed equality is not so artificial as it at first appears, since gunpowder and modern inventions have equalized the martial worth of individuals making the skillful, though weak, superior, man for man, to the unskilled, though strong.

The discussion concerning expressions of sovereignty in times of peace and the artificial equality of qualified individuals assumed to be possessors of the sovereignty applies to modern democratic states, whether their governments are monarchic or republican. In such states the peaceful determination of the sovereign will necessarily depend upon the expressed will of the greater number of the assumed possessors of the sovereignty, since unanimity is substantially impossible when the possessors are numbered by thousands or even by hundreds, unless some artificial plan is followed, such as was employed in the Iroquois confederacy. The result is that *the rule of majorities* is supreme. It is well to fix in the mind these two characteristics which mark the exercise of sovereignty in times of domestic peace, namely, *the equality of individuals in possession, and the rule of majorities.*

SOVEREIGNTY IN A FEDERAL STATE

The nature of sovereignty in a single state, whether it be real or artificial, yields readily to analysis, but the more complex type found in a composite state, particularly in a federal state like the United States, requires careful discrimination between the actual and apparent facts in order to determine the true nature of such sovereignty. The real and the apparent results of historical events must be distinguished and the mind of an American student must be freed from the bias and prejudice which for a half century have influenced writers upon political science in dealing with the institutions of the United States.

It is an accepted principle of the law of nations that every state, whatever may be its population, power and resources, is the political equal of every other state, and that its sovereign is independent and supreme within the state. There is no such

thing as *degrees* of sovereignty among states; the nature of real sovereignty precludes such a thought. Now let this manifest truth be applied to the problem of sovereignty presented in the federal state of the United States.

This condition of independence and equality obtaining among states was recognized in America during the war for independence by each of the thirteen colonies having an equal voting power in the revolutionary government and also in the government established by the articles of confederation; and this equality prevailed irrespective of the great contrast in the territorial extent, wealth, and population of certain of the allied colonies. From this fact alone it may be assumed that during the period from the commencement of the Revolution to the adoption of the Constitution of 1787, each one of the thirteen original states was a distinct, independent political society with a separate sovereign, otherwise this assumed equality would have no theoretical or practical basis.

A federal state or union, originating from the joining together of several independent states, is from its composite nature a political organism, in which the individual units are such states instead of persons. If this statement is correct and the likeness is at all complete, the same general rules which apply to a state composed of persons ought to apply to a federal state composed of states, and the same incidents should be manifested.

It has been shown that the sovereignty in a single state in times of domestic peace is shared *equally* by a body of qualified individuals, and that the chief sovereign acts are the adoption of a constitution and of constitutional amendments. Applying this test to the American Union, which presents an example of a complex type of federal state, the federal constitution and all amendments to it should, if the similarity to a single state exists, be adopted by the states of the union voting as units, each state having an *equal* voice in such sovereign acts. This is indeed the fact.

There is, however, this difference between a single state and the particular federal state under discussion. In the adoption of the Constitution of the United States no state was considered to

be subject to its provisions and to the government which it established until such state had voluntarily and formally submitted to the instrument. In the case of a single state, on the other hand (unless Pufendorf's theory of a "governmental contract" is accepted), every individual, whether willing or unwilling, is *compelled* to cooperate in maintaining the government established and to obey the will of the sovereign as declared by the sovereign or through the medium of an authorized agent. At least theoretically this difference exists and has been generally accepted as existing. Here are the facts. It was provided by the Constitution of 1787 that it should become operative upon being adopted by the people of nine of the thirteen states which had united under the articles of confederation. Nine was a majority so large that they doubtless possessed the physical force to compel obedience from any or all of the other four states if they declined to accept the constitution. The question is, would those that assented to its provisions have compelled those declining to submit? Suppose Rhode Island had finally and emphatically refused to become a member of the union, would the other states have permitted it, considering its geographical situation, to remain independent and free from federal jurisdiction and law? It is, and must remain, an open question, since all the thirteen states voluntarily came into the union. There seems to be, nevertheless, but one rational answer to this hypothetical question, and that is that the strong for their own self-defense would have coerced the weak. The difference, therefore, which is stated above may be imaginary rather than real; an erroneous theory rather than a right one. The opportunity to test its correctness never arose.

Having once entered into the community of states and submitted to the rules of the majorities fixed by the Federal Constitution, a state was in much the same status as that of a naturalized citizen who, having sworn allegiance to the government of a state, must bear the burdens as well as enjoy the privileges of citizenship. A state, on becoming a member of the federal union, is bound to abide by the will of the constitutional

majority no matter how tyrannical and unreasonable such majority may be, or to what extent changes in the fundamental law may affect its original condition or modify its local institutions. There is, however, one important exception to this rule. If a state doubts whether the constitutional majority or the government established by it actually represents the possessors of the real sovereignty, it may appeal to force to determine where the superior physical might of the union rests. It is a question of fact rather than of right, although the states composing a federal state possess the so-called natural right to rebel against tyranny and oppression, as do the individual members of a single state, a right in fact to test the reality of the sovereignty which is being exercised.

Sovereignty in times of domestic peace rests in those who as units adopt and amend the constitution, whether in a single or a federal state. In the United States these units are clearly the *political groups* of individuals, each of which forms a separate state of the union, and not the individuals themselves. Amendments to the organic law come into operation upon being approved by three-fourths of the *states* and not by any fixed majority of all the qualified *citizens* in the union as a whole.

An essential characteristic of the possession of sovereignty, when domestic peace prevails within a state, is equality among the members of the possessive body of qualified individuals. This equality exists as between the states composing the United States, but it does *not* exist as between United States citizens resident in different states. For example, Nevada and New York, as states, have an equal voice in passing upon an amendment to the constitution of the federal state, but on account of their great difference in population a citizen of Nevada has *nearly two hundred times* more voice in such legislation than a citizen of New York. A still more forceful illustration is that of a United States citizen residing in one of the federal territories, who in spite of his full citizenship has no voice at all in constitutional enactment. These facts are cited simply as cumulative evidence of the assertion, that the states as units and not the citizens of

the United States are the assumed possessors of federal sovereignty in times of internal peace.

From the foregoing it will be seen that, in times of peace, the individual states in a federal state like the United States stand in the same relation to the federal sovereignty that the male citizens of legal age stand to the sovereignty in a single state. To carry the analogy further in the case of the United States—the territories of the United States are similar to citizens of the male sex in a single state, who are minors, but who will in time attain to equality in sovereign rights; and colonies are like the females in a state, who owe it allegiance but lack the inherent qualities to become possessors of the sovereignty. Thus the American federal system is the rational and logical development of the republican principle as it appears in a single state.

The order of the consideration of sovereignty in a federal state has been reversed from that followed in the case of a single state for the reason that a federal state is the product of peaceful conditions and internal peace is necessary to its continuance. It might be argued from analogy to a single state that in times of domestic war the equality of states composing a federal state, which is assumed in times of peace, disappears, giving place to the true measure of sovereignty, *physical force*, determined by the resources and military strength of the individual states. To maintain such a proposition the assumption must be made that the states in a union continue as separate and distinct units in determining the location of the real sovereignty. However harmonious with the federal principle such an assumption may be, and however logical it may appear to thus continue the analogy between a single and a federal state in their relations to sovereignty, experienced facts deny the truth of the assumption and the correctness of the analogy.

ARTIFICIAL NATURE OF A FEDERAL STATE

Political units, such as the states of a union, are the product of reason and agreement, and not of force. They are, therefore, in fact artificial in so far as they are considered units. The exercise

of force in a federal state; that is, the expression of the real sovereignty, of which the American Civil War is a noteworthy example, proves that such sovereignty rests upon a deeper foundation than the states as political units. In the case of a domestic conflict involving the entire union a state is divided through the adhesion of a portion of its citizens to one side of the contest and of another portion to the other side, without regard to the opinion of the majority. Though the majority of the individuals in certain states may give their support to one of the belligerent parties, and the states may be said to be in favor of that party, the minority may, by uniting with the opposite party in other states make the physical strength of such opposition superior. It is apparent that the individual, rather than the state, is the important factor in determining the location and possession of the real sovereignty. The true possessor of such sovereignty is, therefore, that mass of individuals in a federal state, which, regardless of the relations which the individuals may bear to the separate states, has the power through the exercise of their combined physical strength to compel obedience throughout the union. Furthermore, this mass of individuals, being able without limitation to enforce absolute submission to their collective will, possesses a complete sovereignty, which may be exercised without regard to the political existence of territorial boundaries of the separate states. Thus a union of states, under the stress of civil war, loses its federal character, and becomes in fact a single state, a nation, although it may, at the will of the sovereign, maintain federal institutions throughout the war.

From the foregoing the following conclusions are established: (1) A federal state cannot exist in its federal character during the progress of a civil war involving the entire federal state. (2) There is no such thing as *real* federal sovereignty. (3) The real sovereignty, which becomes manifest by the exercise of superior force throughout a union of states, is national. (4) A federal state having been subjected to the exercise of the real sovereign and thereby nationalized, its national character is not destroyed

though it returns, with the consent of the real sovereign, to the forms and practices of a federal system.

Since, therefore, domestic peace is essential to the existence of a federal state, a federal sovereign, and federal sovereignty, the further consideration of such sovereignty in these notes must be predicated upon internal peace and with a full recognition of the artificial character of such sovereignty.

NOTES ON SOVEREIGNTY IN A STATE

Second Paper[1]

In Part First of these notes the nature of sovereignty was discussed and its manifestations in a single state and a federal state considered. It is now proposed to carry the investigation further, and to see the effect of viewing sovereignty from standpoints internal and external to the state. Having completed this examination, the subjects of *independence, civil liberty, state liberty, constitutions,* and *law* in their relation to sovereignty will be briefly treated.

INTERNAL AND EXTERNAL SOVEREIGNTY

> This sovereignty of the State may be looked at from without and from within: from without, as the independence of a particular State in relation to others . . . : from within, as the legislative power of the body politic.[2]
>
> Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its rulers by its municipal constitution or fundamental laws. External sovereignty consists in the independence of one political society, in respect to all other political societies.[3]

The above quotations are given to show that the subject of this note is not novel; and, although the statements and deduc-

[1] Reprinted from *The American Journal of International Law*, vol. i (1907), pp. 297–320.

[2] Bluntschli, p. 501.

[3] Wheaton, *International Law*, p. 29.

"We have seen what is meant by a state. If we add to the marks already given in our definition of it, the further mark that the body or individual who receives the habitual obedience of the community does not render the like obedience to any earthly superior, we arrive at the conception of a *Sovereign or Independent State*, which possesses not only internal sovereignty, or the power of dealing with domestic affairs, but external sovereignty also, or the power of dealing with foreign affairs." Lawrence, p. 56.

tions here made may not accord in detail with these extracts, the general idea will be the same. To elaborate this idea in harmony with the theory of the previous notes it may be well to formulate a new statement rather than adopt either of those quoted. Assuming that the Bluntschli assertion is correct, that the sovereignty in a state may be looked at from two points of view, namely, from *within* and from *without* the state, it should be added that, though the actuality of the sovereignty does not change, its precise location may be general or specific according as the point of observation is external or internal. This statement needs further illustration to be entirely clear. To the individuals who are *within* a state the actual location of the sovereignty, both real and artificial, is of the highest importance, for upon its proper exercise depend the character of political institutions and the guaranty of the public and private rights of individuals. To those who are *without* a state, on the other hand, the exact location in a state of the sovereignty is not a matter of concern or inquiry. For all practical purposes in the external relations of a state the established government is accepted as the properly constituted agent of that sovereign.

Viewed from *within*, the sovereign power may be in a small body of individuals, or in a large body of individuals, but never in all the members of a state. Viewed from *without*, it is sufficient that such power is possessed *in* the state and not *outside* of it. From this broader, external point of view a state may be reasonably, as it commonly is, termed "sovereign and independent," though from the narrower, internal point of view it can never be properly so characterized. No matter how often the location of the sovereignty may change within a state, no matter whether the real or the artificial sovereign creates and controls the government, the state in its relation to other states has *somewhere* within itself the possessor of the sovereignty, of which the existing government is presumably the authorized agent. Further than to establish this fact it is unnecessary, and indeed improper, for another state to inquire. These are the conditions which exist in times of domestic peace and in times of foreign war.

When, however, a state of civil war exists, there may be estab-

lished in a state two distinct governments, each of which claims to be the true and sole agent of the sovereign and is supported in its claim by numbers of the individuals composing the state, who employ their physical force in its behalf. In these circumstances it becomes necessary for other states to decide which of these rival governments is right in its claim; or, in case such decision is for the time being impossible because the superior physical strength of the real sovereign has not manifested which government it favors, a foreign sovereign or the government of such sovereign may declare its uncertainty by recognizing the *legal* right of the government, which prior to the war represented the sovereign, and the *belligerent* right of the other, which denies the authority of the older government to act for the sovereign, and is attempting by force to disprove such authority. By this course a foreign sovereign or government remains non-committal, neutral, until the real sovereign by exercising superior physical might manifests which of the rival governments is its true agent.

But even under such conditions it is not for those outside of the state to determine *where in* the state the sovereignty is actually located; that is exclusively a domestic question to be decided by the individuals composing the state. So far as foreign sovereigns and governments are concerned (to emphasize what has already been said by repetition) the sovereignty is *within* the state, and the established government is presumptively the properly authorized agent of the possessor of the sovereignty until such government is completely overthrown. For this reason, when a revolution takes place in a state and the real sovereign establishes a new government, the obligations incurred by the former government in its dealings with those outside the state are binding upon the new agent of the sovereign. The revolution from the external point of view is not a change in sovereigns but a change in agents of the sovereign. In the case of the transference of colonial possessions, however, there is an actual change of sovereigns, and the obligations being those of the sovereign follow the original possessor of the colonies.

Sovereignty which thus presents different characteristics, when it is viewed from without or from within the state, has also

interstate disputes; provided, that the federal government as such agent possessed the superior physical force to compel obedience, and the opposition to the government was not of such magnitude as to cause an expression of the real sovereignty. No state could actually deprive its sovereign of external sovereignty by any act of surrender unless the recipient of that sovereignty was physically able to maintain its authority; but the superior might of the federal state compared with that of any state of the union is too manifest to require discussion.

Possessing the entire external sovereignty of all the states within the union, the federal sovereign became thereby the *treaty-making power* of all, both between the states of the union and between them and foreign states, the power which in times of international peace is the highest manifestation of external sovereignty. Exercising this power the federal sovereign, acting for each and all of the individual states, binds all to obey treaty provisions which thus become laws superior to the laws enacted by the respective state sovereigns.

The creation of the federal union of the United States was an act of external sovereignty on the part of each state which took part in the adoption of the constitution; and a subsequent entrance into the union was a similar act by the state admitted. *Whenever a state is spoken of as possessing or exercising sovereignty it is to be understood that the sovereign of the state is intended.* By that act the external sovereignty passed to the federal sovereign, and as all things pertaining to the federal relation between the states belonged to that sphere of sovereignty, the federal sovereign alone possessed the authority to dissolve the union or to allow one or more states to withdraw from it and reassume their external sovereignty. A state, therefore, did not in itself possess the sovereign right to secede from the union, that right was surrendered when it surrendered its external sovereignty to the federal state (we are speaking of a legal rather than an ethical right); but a state did possess the right to doubt whether the federal sovereignty coincided in its exercise with the will of the real sovereign and to test such doubt by an appeal to force; it is the same right of revolution which may, under certain

conditions arising in a single state, be justly and morally invoked by individuals.

Since the creation of the federal union was an act of external sovereignty the Constitution of the United States is an instrument in the nature of a treaty between the several states and the amendments to the constitution are of the same nature. There is this difference. In the case of accepting the constitution a state being then in full possession of its external sovereignty acts for itself; but in the case of a constitutional amendment the federal sovereign acts for the state, since by previous acceptance of the constitution the latter divested itself of its external sovereignty confiding it to the federal state.

In the enactment, application and enforcement of the laws of the United States the sovereignty exercised, though apparently internal, is none the less external. Federal laws are regulations which, so far as they apply to individuals, are imposed upon and enforced against them by virtue of the powers granted by the federal constitution and not by virtue of a power inherent in the sovereignty of the federal sovereign. The authority of such laws rests upon that instrument. They thus become binding by treaty stipulation; and if a federal law is enacted which is without the specific grant it becomes void when such fact is officially declared. The adoption and enforcement of international regulations, whether they apply to states or individuals, is clearly within the scope of external sovereignty, and the possessor of that sovereignty, the federal sovereign, holding that authority, has the legislative, executive and judicial organization for the declaration and enforcement of such regulations throughout the union.

United States colonial possessions being owned by the union are governed under the external sovereignty of the federal state in the same way that two or more sovereigns establish and operate a joint government over a community exterritorial to the states of such sovereigns. The governmental authority, therefore, of such dependencies, whether colonial or protectorate, rests upon those principles which constitute the law of nations, and the operation of the federal constitution in colonies and upon

independent;[1] although, since independence is a subject of importance from an external point of view alone, it is not illogical to apply it to the condition of the state itself, for the location of the sovereignty within the state is non-essential to the external observer.

There can be no *actual* independence of a state unless the real sovereignty is held within the state; and no individual or body of individuals can possess that sovereignty without being *actually* independent. The truth of these propositions is so self-evident as to require no demonstration. Just as *superior physical force* is internally an essential quality of real sovereignty, so *independence* is externally an essential quality.[2] Neither can be separated from such sovereignty without destroying it. Both must exist and be actual. It is only in the case of artificial sovereignty that one can conceive of a sovereign dependent upon or responsible to a higher power. The suggestion that the apparent possessor of the sovereignty in a state is not entirely independent at once

[1] "The notions of sovereignty and independent political society may be expressed concisely thus.—If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

"To that determinate superior, the other members of the society are *subject:* or on that determinate superior, the other members of the society are *dependent.* The position of its other members towards that determinate superior, is *a state of subjection*, or *a state of dependence.* The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection.*

"Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent.* The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society." Austin, p. 221.

[2] These two essentials of real sovereignty, *supreme power* and *independence*, are brought out very distinctly in a quotation from The Neutrality of Great Britain During the American Civil War, by Montague Bernard, which appears in Maine's International Law, p. 54. The extract is as follows: "By a Sovereign State we mean a community or number of persons permanently organized under a Sovereign Government of their own; and by a Sovereign Government we mean a Government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior Government. These two factors, one positive, the other negative—the exercise of power, and the absence of superior control—compose the notion of sovereignty, and are essential to it."

raises the query whether the sovereignty possessed is real or artificial? The determination of whether or not an individual or body of individuals, claiming the real sovereignty, is independent or dependent is conclusive evidence of the rightness of the claim.

CIVIL LIBERTY

Civil liberty or *individual liberty*, as it is often called, differs from independence in that the latter is absolute liberty, and the former is only so much of absolute liberty as can be equally possessed by the individual members of a state. Avoiding comparison, civil liberty may be defined as a condition in which an individual possesses as a legal right the power to act in accordance with his own inclinations within certain limits fixed by the sovereign of the state in which the individual is at the time. In this limited sphere, which must not impinge upon the similar spheres of his fellows, the actions of an individual are unrestrained.

While a man in his natural state may be said to be born with the right of absolute liberty, the fact that he enters the world as a member of society imposes upon him at once the obligation not to infringe upon the equal liberty of other men. Thus, the social condition by the operation of nature limits the liberty of the individual from birth, and this natural and unavoidable limitation, like the liberty which it limits, is inherent.[1] Man's liberty so restricted is a *natural* or an *inherent right.*

Though there may be a *moral* obligation upon the sovereign to grant to every individual in the state the liberty which may be justly claimed as a natural right, the sovereign being the possessor of supreme power cannot be compelled to recognize such obligation and to permit the individual to enjoy such right.[2] If it is done the act is entirely voluntary on the part of the sovereign. It follows that *civil liberty rests wholly upon the will of the sover-*

[1] Paley thus defines liberty: "To do what we will, is natural liberty; to do what we will, consistently with the interest of the community to which we belong, is civil liberty."

[2] "Political or civil liberty is the liberty from legal obligation, which is left or granted by a sovereign government to any of its own subjects." Austin, p. 274.

eign, and sovereignty is its only source. This fact arises from the nature of the sovereignty in that it is supreme in all the affairs of a state. It is thus stated by Burgess:

> The unlimited sovereignty of the state is not hostile to individual liberty, but is its source and support.[1]

The proof of this is to be found in comparing the amount of liberty possessed by individuals in different states. For example, in Great Britain a person can act and speak with far more freedom than he can in Russia; he has a freedom of petition which a Turkish subject does not have, and a freedom from judicial oppression, which no Chinaman enjoys.

Actual civil liberty must not be confounded with the right of civil liberty. They may or may not coincide. In any event they are not identical. Whether an individual can *rightfully* demand greater privileges, and what are the *rightful* limitations which a sovereign may fix upon the acts of individuals are ethical and not political questions. The answers do not depend upon a universally accepted moral standard, for no such standard exists, but upon the moral beliefs of the persons who make the answers. Manifestly the ethical idea of civil liberty varies according to the character of the philosopher, and the enlightenment of the epoch and state in which he lives.

Civil liberty, as a voluntary grant by a sovereign, is determined in three ways: *first,* by declaring with what acts of an individual the government, the sovereign's agent, must not interfere; *second,* by declaring what acts an individual must not perform; *third,* by declaring from what acts of other individuals the individual must be protected. In states which have governments representative of the real sovereign, the first declaration is commonly embodied in a so-called bill of rights which forms a part of the fundamental law, the constitution; the second and third declarations are, with a few exceptions, made by ordinary legislative enactment.

In illustration of what has been said, the federal constitution of the United States among its first amendments includes a bill

[1] Burgess, vol. i, p. 55.

of rights, thus, as it were by treaty provision, providing the same limits to civil liberty throughout the federal union. Similar provisions are also inserted in the constitutions of the various states. In this way the sovereignty of the United States in its external character, and the sovereignties of the several states in their internal character unite in fixing the bounds of the civil liberty of an American citizen.

STATE LIBERTY

In a union, such as the United States, in which the states are presumptively the units of the federal state, there exists *state liberty*, which is the counterpart of the civil liberty of persons except that it is applied to the states as individuals, and is additional to the civil liberty guaranteed to persons by the federal constitution. State liberty is determined in the same way as civil liberty; that is, by three modes of declaration, except that all the declarations are included in the federal constitution, and are in fact treaty stipulations. Thus, by the constitution the federal government is prohibited from certain acts of preference in regard to any one state; a state is prohibited from performing certain government acts and from interfering with certain acts of the governments of other states.

State liberty stands in the same relation to federal sovereignty that civil liberty stands to sovereignty in a single state. In both cases the *individual member*, whether persons or political communities, are free in their respective spheres, but those spheres may be arbitrarily contracted or expanded by their respective sovereigns. Indeed, a state of a federal union or an individual of a single state may be deprived of all liberty; not that such an act of deprivation would be morally right; it might be, or it might not be, and yet it would be legally right, and entirely within the scope and power of the sovereign.

CONSTITUTIONS

The consideration of the subject of this note at this place may seem to be premature since it would naturally follow rather than precede the general subject of law; from another point of view,

however, the political phase of constitutions might with propriety have been earlier discussed, and particularly so if the views of some writers are adopted. Burgess says:

> Not until the state has given itself a definite and regular form of organization, *i. e.* not until it has formed for itself a constitution, does it become a subject of public law.[1]

From this standpoint the subject of constitutions precedes law. They will be considered in this note from their *political* aspect, and the consideration of them in their *legal* aspect will be had in the note upon the general subject of law.

The original Latin signification of the word *constitution* was a law embodied in an imperial edict; that is, a law emanating directly from the sovereign. It was used in the same sense in England during the Norman period. Later the word came to have a broader meaning, being used to designate *a body of laws.* In modern times the sense is restricted to *the body of the fundamental law of a state.* In spite of these changes the word has retained the idea which it originally possessed, that of law uttered directly by the sovereign. According to the present use, every state, however crude its organization, possesses a constitution, and since it originates with the sovereign it adds a further proof to the assertion that the sovereign is preexistent to the state.

Although the classification is open to objection, it is convenient to divide constitutions into two general classes; those that are *written,* and those that are *unwritten.* A *written constitution* is a single document furnishing a complete system of government, which is uttered by the sovereign of a single state or by the sovereigns of several states uniting in a federal compact. An *unwritten constitution* is a body of rules or laws, more or less complete, which have from time to time been declared or recognized by the sovereign of a state or the authorized agent of such sovereign, and which relate to the governmental institutions of the state. The written constitution is a product of modern civilization; the unwritten constitution is the natural type which has existed from the beginning of human government.

The distinction made as to written or unwritten is incapable

[1] Burgess, vol. i, p. 49.

of literal application in every case, and in this lies the chief objection to that classification. For example, the greater portion of the unwritten constitution of England is embodied in enacted laws and is, therefore, written. On the other hand, the provisions of the written constitution of the United States are often extended by implication and are, therefore, not included in terms in the written instrument itself. Custom and usage may also modify to a certain degree a written constitution, but these agencies are of slight importance in affecting such a constitution compared with the influence which they have upon the unwritten type, particularly upon the constitutions of barbarous or semi-civilized states.

All constitutions, irrespective of the class to which they belong, comprehend three distinct subjects; first, *government;* second, *civil liberty;* and, third, *constitutional amendment.* In unwritten constitutions the last subject is always dealt with according to usage and custom and is never embodied in a written declaration. To illustrate: The parliament of Great Britain can change the constitution of the United Kingdom, so far as it deals with the first two subjects, by the passage of an act (eliminating as a legislative factor the obsolete veto-power of the king). Usage and custom have confirmed this mode of amendment. But in the United States, the federal constitution can only be amended in the manner provided by article V of the constitution; and the constitution of each state can be amended only by the method prescribed in such constitution. In fact, in Great Britain the only distinction between a constitutional law and any other law is in the subject-matter of the legislation. If a parliamentary act affects existing governmental forms (as did the act of succession of 1689), public rights (as did the reform bill of 1832), or civil liberty (as did the *habeas corpus* act of 1679), it is amendatory of the British constitution.[1]

[1] "It is a difficult matter to determine exactly what is constitutional law as distinguished from ordinary statute law, when the enacting body in both cases is the same. . . . But we may assume, I think, that the sovereignty within the constitution, the general principles of liberty, the form and construction of the government, and the character and extent of the suffrage are natural subjects of constitutional law." Burgess, vol. i, p. 138.

It is apparent that unwritten constitutions, being at all times subject to amendment by the legislative branch of the government, are more readily changed than written constitutions which invariably prescribe a method of constitutional amendment much more difficult than ordinary legislation. Because of this difference, unwritten constitutions may be termed *mobile*, and written constitutions, *fixed*.

The chief advantage of an unwritten constitution is the ease with which it can be changed to meet new conditions. Mobility and therefore adaptability are the features in its favor. The chief disadvantage of such a constitution also arises from its mobile character, for, constantly dependent as to its provisions upon the ability and integrity of the legislative branch of the government, the folly or immorality of that branch may cause unwise or unrighteous amendments, which can only be immediately cured by the exercise of force by the real sovereign, that is, by revolution. If the legislative branch is composed of an elected body of representatives, it is in fact a perennial constitutional assembly or convention controlled by a simple majority, which from its composition is liable to frequent changes of opinion. The virtues and the evils of the system are manifest.

While in a state possessing a written constitution there is little liability of governmental forms or civil liberty being seriously affected by the personal character of the legislators of the government, difficulties are frequently caused by the fixity of the fundamental law when new and unforeseen conditions arise in the state. In the United States these embarrassments have been in a great measure overcome by a liberal construction of certain provisions of the federal constitution, on the theory that it was the original intention of its framers to provide for every contingency that could possibly arise and that the powers granted by the constitution are sufficient for every condition. The medium, by which this desirable and necessary elasticity has been obtained, is judicial interpretation, so that the danger does not lie in the character of the legislators but in that of the judicial officers which, rightfully or wrongfully, is considered of a higher and more conservative order than that of the average

legislative body. By this means the principal advantage of an unwritten constitution, its mobility, is secured without the attendant danger of radical changes by legislators who are dishonest or weak.

It is apparent that in a state with a written constitution the danger of a revolution undertaken for the purpose of changing the fundamental law is far less than in a state with an unwritten constitution. A careful distinction should be made between revolutions of this character and those which have to do merely with changes in the agent of the sovereign; that is, the government. Revolutions of the latter sort may take place without affecting in any way the constitution of the state.

Those who are desirous to examine further into the subject of this note are referred to the unwritten constitutions of the following states: Rome, France prior to the Revolution of 1789, Great Britain and Hungary. The tendency of modern states is toward the adoption of written constitutions. Of this class the constitutions of the following states may be examined to show the type in single states: France as a republic, Chili and Japan. Of the constitutions of composite states those of the following should be studied: The United States, the Swiss Confederation, the German Empire, and the Confederated Monarchy of Austria-Hungary. The above examples show the various types of governmental systems that have developed under different environments.

LAWS

A *law* in a state is a rule of human conduct emanating from the sovereign. This is true whether the rule is laid down by the possessor of the real or of the artificial sovereignty, or is declared by the sovereign directly, or indirectly through an agent authorized by the sovereign to make such declaration. In this connection the following statements by Austin and Bluntschli are in point as bearing out this definition.

> Laws proper, or properly so called, are commands. (Austin, p. 79.)

He defines "positive law" as

> law set by political superiors to political inferiors. (Austin p. 86.)[1]
>
> The legislative power is the normal manifestation of the sovereignty of the State. . . . In constitution-making and legislation the sovereignty of the State is in active exercise: otherwise, as a rule, it is in repose. (Bluntschli, p. 509.)

This last quotation is of particular value as stating a truth which applies universally under peaceful conditions, if there is added to the making of laws their interpretation and execution, and if in place of the words "*of* the state" are substituted "*in* the state." It should also be noted that the expressions in the quotation, "constitution-making" and "legislation," both describe processes of *law-making*.

A law, without classification as to its character, may originate in any one of four ways: (1) By direct act of the *real* sovereign. (2) By direct act of the *artificial* sovereign. (3) By formal pronouncement of a legislature. (4) By tacit acquiescence of the sovereign, either real or artificial.

(1) *By Direct Act of the Real Sovereign*

A law which comes into being in this way is fundamental. It is the highest type of legislation. In states which have governments instituted directly by the real sovereign, all written constitutions and all constitutional amendments are composed of such laws. They are usually declared in explicit terms by the sovereign, but in certain circumstances they may arise from the exercise of the superior force of the sovereign. In the latter

[1] "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) 'the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.'" Austin, p. 220.

"Law, properly, is the word of him that by right hath command over others." Hobbes, *Leviathan*, ch. xv.

case the act of the sovereign is usually supplemented by a formal declaration, but it is not always done. Questions of conduct, which the sovereign decides by the exercise of physical strength, are of such magnitude as to affect political or social institutions that are interwoven with the very fabric of the state, and to cause civil strife. It is in this strife that the will of the real sovereign is manifested by the exhibition of superior might.

An example of this method of expressing the real sovereignty is to be found in the American civil war. In that conflict the real sovereign of the union decided by force of arms two questions, the one political, the other social. The political question was whether a state could at will secede from the federal state and reassume its external sovereignty. The social question was whether slaves could be held within the territorial limits of the United States. Both of these questions were answered in the negative by the real sovereign. The denial of voluntary secession was never formally proclaimed, but the maintenance of the territorial integrity of the union by superior physical strength operated as an emphatic expression of the sovereign will, a law in fact, if not in conventional form, which forbade a state to secede from the federal state. On the other hand, the institution of slavery, though actually abolished by the governmental agent of the real sovereign, was subsequently in formal manner abolished by constitutional amendment enacted in due form by the federal sovereign.

Thus, whether expressed by the exercise of physical force or embodied in a formal declaration, a rule of conduct emanating directly from the real sovereign is a law, which is of special dignity because of its immediate source, and because it is unquestionably the expression of the sovereign will.

(2) *By Direct Act of the Artificial Sovereign*

Laws of this class can only originate in states having monarchic governments of pronounced autocratic form, or in states where formerly such unlimited monarchies existed but which have since introduced democratic institutions without changing the general monarchic form of the government. These laws are not

confined to those that are fundamental, as those of the preceding class, but embrace legislation of all types. They include royal decrees, proclamations, and every other form of command and prohibition issuing directly from the artificial sovereign which by reason of the governmental organization can be enforced by that sovereign. The decrees of the ancient empires of Assyria and Babylon and Persia, the imperial edicts of the Roman emperor, the royal charters of England, and the ordinances of the kings of France, belonged to this class of laws. Modern examples are to be found in Turkish firmans, Russian ukases, the edicts of the Chinese emperor, the decrees and executive orders of the dictator-presidents of certain Latin-American republics, and, among states without written constitutions, in the proclamations putting into effect treaty provisions, such as the English "orders in council." In form, a proclamation by the president of the United States belongs to this category, but being an executive power delegated by the constitution it is in reality a legislative act authorized by the federal sovereign. Martial law comes under this head unless enforced by a legally constituted representative of the real sovereign in accordance with the demonstrated will of such sovereign.

There are also laws of a different character which originate in this way. They are those that arise from the declaration of the artificial sovereign acting in a judicial capacity. Austin says that the sovereign's "direct and proper purpose is not the establishment of a rule, but the decision of the specific case"; and that "he legislates *as properly judging* and not *as properly legislating.*" Examples of such laws are the decrees of the Roman emperors, and the decisions of a monarch acting as a supreme judge, a general and frequent exercise of sovereign authority before the development of modern governments and the separation of the executive, legislative and judicial branches. The continued application of the rules thus declared, however, when applied by judicial officers other than the artificial sovereign, fall under that category of laws mentioned in the fourth method of origination.

(3) *By Formal Pronouncement of a Legislature*

Laws of this class are always written and always formally promulgated in accordance with the governmental system of the state, provided such system has a distinct legislative agent designated by the sovereign, either real or artificial. With these laws, which are commonly known as *statutes*, are included all proclamations and orders issuing from the executive department of the government, when the authority for this limited form of legislation is given by the constitution of the state.

As the real sovereign does not directly enact laws of this character, except in states with pure democratic governments or in those where the *initiative* or *referendum* are employed, but delegates the authority to a legislative agent, such laws in states with written constitutions lack the characteristics of fundamental law. However, in states with unwritten constitutions, laws of this class relating to constitutional subjects are deemed to be amendatory of the fundamental law, though liable at all times to be annulled by the real sovereign or to be repealed or modified by the legislative agent.

The instability of statutory law is manifest considering how frequently legislative representatives change and how continually popular opinion in states with liberal institutions varies under the influence of new conditions and the development of social, religious, ethical and political thought. While certain laws, rooted in principles of simple justice, in long established ideas of right, or in racial traits, remain constant, the great mass of statutory law is constantly fluctuating, expanding by new legislation and amendment or contracting by amendment and repeal, to meet more perfectly the needs of society or the ideas that have become dominant.

(4) *By Tacit Acquiescence of the Sovereign*

Laws of this type include those that spring from custom, usage, and principles of natural justice. In states deriving their jurisprudence from Rome customary law forms an important part of the general law, while in England and the United States laws of this character are embodied in the common law. The force of all

such laws is based upon the tacit acquiescence of the sovereign in their application by the courts. "*Qui non improbat, approbat*"[1] is the maxim which is applied. Sir Henry Maine says:

> The laws with which the student of Jurisprudence is concerned in our own day are undoubtedly either the actual commands of Sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula "a law is a command," by help of the formula, "whatever the Sovereign permits, is his command."[2]

It is clear that all such laws grow in authority the longer and the more frequently they are applied, and that, through their announcement in judicial decisions, they obtain the characteristics of written laws, namely, positiveness and exactness. The importance of precedent as a means of giving stability to laws of this character is apparent.

While the Roman law rests largely upon the authority of early writers who declared the legal principles practiced in ancient times and which were accepted as customary, the common law finds its chief source in the declarations of courts, which applied principles of natural justice to all cases which were not affected by enacted laws. It is true that the courts assumed that these principles had been announced in lost statutes or had become established by custom and usage, and that they were, therefore, legally binding having received the positive or tacit approval of the sovereign. But this assumption rests upon no evidence, except in a few cases, as when, for example, the sovereign as a judge declared the law; it is purely a legal fiction. If it could have been established, the common law in its inception would have rested upon a higher authority than it in fact does. A statute is the express will of the sovereign declared by himself or an authorized agent. A custom, which has attained to the force of a law, has received the *actual* acquiescence of the sovereign. But a principle of natural justice acquires its legal force from an *implied* acquiescence of the sovereign, unless announced by the

[1] 3 Coke's *Institutes*, 27.
[2] Maine, p. 374.

sovereign acting in a judicial capacity. The fact that the application of such a principle is declared to be an "immemorial custom" or "according to immemorial usage," in no way affects the nature of the acquiescence of the sovereign. In the great bulk of cases the appropriate law is set forth in previous judicial decisions; but, as there must have been in every instance a *first* decision, the law announced therein must have been an application of the principles of natural justice, which being declared by judicial authority are termed by Austin "judiciary law" or "judge-made law."[1]

Justice in the abstract as applied to human affairs, or *natural justice*, as it may be called to distinguish it from *legal justice* (*i. e.*, the application of the laws of a state), is the desire and intent to render to every person that to which such person is entitled. Toullier makes the distinction between virtue and justice

> that that which is considered positively and in itself is called virtue, when considered relatively and with respect to others has the name of justice.[2]

In a word, virtue is righteousness applied to self; justice, righteousness applied to others. Burke said that

> justice is the great standing policy of civil society.

In accordance with this truth it is assumed that a sovereign wills to be preeminently just, and that in controversies, to which enacted law does not apply, it is the sovereign will that principles of natural justice shall be applied. "*Legibus sumptis disinentibus, lege naturali intendum est.*" On this assumption such principles, though often modified by enacted law, are accepted as the

[1] "The common law includes those principles, usages, and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. . . . A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason to particular cases." Kent, *Commentaries*, 2d Am. ed., 1832, vol. 1, p. 471.

[2] *Le droit civil français*, Pr., tit. prél., n. 7.

will of the sovereign and as such are subject to judicial interpretation, declaration and application.

It is apparent that, as natural justice is unlimited in its scope, the common law, either declared or undeclared, is applicable to all possible social relations between man and man, and to all possible relations between government and society. This fact gives rise to the maxim, "*Lex semper dabit remedium.*" But, though the common law is ethically superior and more truly in accord with the dignity of a sovereign, enacted constitutional law and statutory law supersede it whenever these come in conflict with it. The reason is evident. The two classes of laws are the express will of the sovereign while the common law, as has been said, rests on *implied* acquiescence.

Disapproval of non-fundamental laws (including in that category statutory and judicial laws and such customary laws as do not relate to constitutional subjects) may be shown by the real sovereign in one of two ways; *first*, by direct legislative act in adopting a nullifying constitutional amendment or in negativing them through the medium of the *referendum;* or, *second*, by physically resisting all attempts to enforce such laws. If the latter method is employed, the resistance must not only be successful, but substantially universal and perpetual, leaving no reasonable doubt but that the forceful manifestation of disapproval represents the collective will of the body of individuals in the state possessing the real sovereignty. If it falls short of this certainty, the resistance fails to be an expression of the will of the real sovereign, and the law retains its full force and validity. The mere act of resisting is not sufficient, that may be simply the crime of an individual, a riot, or an insurrection, according to the magnitude of the opposition and the degree of force used. *Resistance that is absolutely and generally successful* is essential to make resistance to law a disapproving act of the real sovereign.

Since the real sovereignty resides among the collection of individuals composing the political state, though its actual location in that body may not be determined and may constantly vary as to the individuals who possess it, and since the laws

limit and control the conduct of *all* the individuals in a state irrespective of the location of the sovereignty, it follows that the individuals composing a state are *collectively* the repository of the supreme governing power, and that they are *separately* the governed. The declaration, therefore, that all government rightly constituted must be founded upon the "consent of the governed"—a declaration of great potency in shaping political events during the eighteenth century—is to this extent true. But since the possessors of the sovereignty never include *all* the members of the state, the assertion is never correct.[1]

What has been said of a *rightfully* established government in its relation to the consent of the governed applies with equal force to the laws emanating from or enforced by such government. The sole purpose of all government in a state is to declare and carry out the will of the sovereign. If it fails to do this, it loses its true character as the agent of the sovereign. Laws are the expressions of the sovereign will. To make, interpret, apply and execute them is the duty of government. Therefore, if a *rightfully* established government rests upon the consent of the governed, its acts, the laws, receive a like sanction. It should, however, be specially noted that it is only *right* charactered government and *right* charactered laws to which this maxim applies, for it is an historical fact that there have always existed governments and laws which do not conform to it and which are decidedly hostile to its spirit. They are undoubtedly constituted in *legal* right, though not in *ethical* right. The use of the word *rightfully* here is in an ethical sense, and not in a legal or political one. Nevertheless, the institutional growth toward liberalism and the moral influence of modern thought are making the application of this ethical maxim of government more and more general throughout the world. But the movement is based upon intellectual influences rather than upon sovereign power.

Natural justice—to repeat the definition already given—is the

[1] What may be styled "*collective* consent" is brought out by Austin in the following statement: "Every government has arisen through the *consent* of the people, or the bulk of the natural society from which the political was formed. For the bulk of the natural society from which a political is formed, submit *freely* or *voluntarily* to the inchoate political government." Austin, p. 298.

desire and intent to render to every person that to which such person is entitled. When applied without limitation or modification, such justice becomes the interpretation and enforcement of moral principles. But in the more restricted sense, which justice obtains when used in connection with the laws in a state, it supplants morality with legality and interprets and enforces legal rather than moral principles. This is the type of justice already designated as *legal justice.* It is apparent without demonstration that the two types are not synonymous; one is unlimited; the other, limited; one is applied morality; the other, applied law; and morality and law are by no means the same thing.

Emanating as law does from a sovereign or from the agent of a sovereign, who being human is morally imperfect, law is not necessarily either moral or right, though it must be obeyed so long as its author possesses the power to compel obedience. Even when a sovereign attempts to make laws conform to morality, he may fail to do so in the judgment of the rest of the world, for the moral standards of sovereigns may differ to such a degree that the principles expressed in their respective legal codes may be entirely contradictory of one another. To illustrate the different conceptions of what is and what is not moral, it is only necessary to compare the ethical codes of the Israelites, of the Mahometan world, of Puritan England, of France during the Terror, of the civilized and barbarous races of today. The obvious and inevitable conclusion is that, though there can exist but one *perfect* ethical standard in the world, moral law as known and accepted by various peoples, like the laws which are enacted by them, is imperfect and affected by the intelligence, the education and the mental environment of each individual or body of individuals that attempts to follow its precepts or to incorporate them in political legislation.

Thus, the principles of natural justice are not a fixed quantity, an inflexible standard, throughout the world, and never will be until all nations come to one mind as to what is righteous in human conduct, both positively and relatively, and adopt a universal, unchangeable and identical code of morals.

NOTES ON WORLD SOVEREIGNTY[1]

INTRODUCTORY

Having reviewed in the preceding Notes the characteristics and qualities of the sovereignty which finds expression in a state, it is proposed to consider now the more extensive type of sovereignty which affects politically the entire human race and territorially the whole earth, and to which reference was made in the Introductory Note. The reason for considering the lesser form first has been stated, and the soundness of that reason will become more apparent in the course of the succeeding argument.

The conception of the type of sovereignty which is manifested in the external and internal relations of a state, is necessarily limited by the point from which it is viewed. Thus far in the discussion that viewpoint has been the state as the highest form of a political organism in that it has attained complete development. In dealing with sovereignty in a state in its external sphere of activity, that is, in the relations between the sovereigns of different states, it was necessary to rest upon the assumption that these sovereigns were equal and equally independent. An assumption, however rational it may be, is never satisfactory and never conclusive; but from the standpoint of the state, the

[1] Reprinted from *The American Journal of International Law*, January, 1921, pp. 13–27.

These *Notes on World Sovereignty* were intended to be a third series to follow and supplement the *Notes on Sovereignty in a State*, which were published in two series in Volume I of THE AMERICAN JOURNAL OF INTERNATIONAL LAW. This third series was not published at the time, however, because the logical application of the theory to the world as a whole seemed too speculative and to lack the practical value of the two series published in 1907. However, the discussion seems less academic and more pertinent to present-day philosophic thought concerning the political relationship between nations than it did fourteen years ago.

The Notes, here printed for the first time, are identical with the manuscript prepared in 1906. Possibly some changes might be appropriately made in the text in view of the new conditions which have arisen since the Notes were written, but it has seemed best to complete the three series in their original form and as of the time when they were written.—ROBERT LANSING, December, 1920.

correctness of this assumption could neither be established nor disproved. Still the truth of an assumption relating to man as a political being and not as a moral being must be capable of demonstration by historical facts. If the point of view is insufficient, it must be widened or a new one taken which will be comprehensive enough to embrace all that has been assumed so that it may be tested by positive evidence. It is intended to do that in these Notes—to widen the horizon of the discussion.

This more comprehensive point of view is the one already referred to, namely that which sees in the world but a single social organism all-inclusive and universal, which minimizes the sovereignties in states, affects their realities, and raises the question whether such sovereignties are real or artificial. Confessedly, if there exists a sovereignty that is superior to the sovereignty in a state, it has not yet developed into the positive type which is manifest in a political state and which history and experience recognize. It is still unformed and necessarily a theoretical conception. Nevertheless, it will be seen, as the nature of sovereignty is viewed from the broader standpoint, that powerful political and moral influences are at work in the world to change the theory into practice. Among these influences, the most potent is the increasing realization by civilized peoples of the interdependence and mutual responsibility of states in their political and economic relations.

This realization compels the conviction that the entire human race ought to be considered, and in fact is, a single community, which awaits the further development of modern civilization to complete its organization and make of all mankind a great, universal political state. There is, therefore, sufficient ground for an examination of sovereignty from this standpoint; and it will be found that, though there has been no formal recognition of the existence of such sovereignty, the great states of the civilized world have recognized, perhaps unconsciously, its existence in the applied law of nations, just as they have recognized it in the sphere of morals by giving binding effect to the principles of humanity.

THE IDEA OF A WORLD COMMUNITY AND WORLD SOVEREIGNTY

Since it is possible to conceive of the human race as one body composed of a large number of political groups, including millions of individuals, or as one body with these individuals as units, and, in either case, as a community, it follows from the very nature of things that in this unorganized mass of humanity there *must* be a certain body of individuals possessing a physical might sufficient to compel obedience by every member of the human race throughout the world. Such superior physical might constitutes sovereignty, and, since its only limit is the earth, it may properly be termed *World Sovereignty.*

The objection may be made that this physical force has never been subjected to organization and has never been exerted, and, that having remained without definite manifestation it is purely hypothetical and its existence theoretical rather than actual. But the existence of such supreme force is self-proving. Since each human being possesses a measure of bodily strength, the union of the physical strength of all the human beings in the world must represent the collective might of mankind. Divide that collective might unequally and a preponderance rests with a certain body of individuals and a lesser portion of such physical power with the remainder of the race. The possessors of the preponderant amount of power, including as a factor intelligent cooperation, are humanly supreme in that they can enforce their collective will throughout the earth. That dominant body of individuals possesses the *World Sovereignty* and is itself the *World Sovereign.*

If the opinions of those writers, who maintain that the state possesses the sovereignty or that the state is preexistent to sovereignty, are accepted as correct, any discussion of World Sovereignty prior to the actual organization of the entire human race into a universal political state would be illogical; but, following the conclusions reached in the preceding series of Notes, that there is a sovereign before there is a state, that the organization of a state is an act of sovereignty, and that the existence of

a community is conclusive evidence of the existence therein of superior physical force, *i.e.*, of sovereignty, the very conception of a *World Community* compels the recognition of a World Sovereign and of World Sovereignty.

THE IDEA OF A WORLD STATE

The first positive and direct expression of World Sovereignty must of necessity be the organization of a *World State*, which presumably will be of a federal character for two reasons, first, because the world is already divided into organized groups of individuals forming political states, and, second, because the federal state is the most highly developed political organism of modern civilization. The idea of a World State is not new; in fact prior to Grotius the idea was general; but under the artificial sovereignty of the Middle Ages it was substantially an impossibility. Today, however, based upon a higher conception of sovereign authority and a more enlightened code of political ethics, the idea is gathering new force.

Bluntschli says:

> It will take many centuries to realise the Universal State. But the longing for such an organised community of all nations has already revealed itself from time to time in the previous history of the world. Civilised Europe has already fixed her eye more firmly on this high aim. . . . Meanwhile unconquerable time itself works on unceasingly, bringing the nations nearer to one another, and awakening the universal consciousness of the community of mankind; and this is the natural preparation for a common organisation of the world. . . . Only in the universal empire will the true human State be revealed, and in it international law will attain a higher form and an assured existence. To the universal empire the particular states are related, as the nations to humanity.[1]

In the last sentence quoted, the idea of the writer that the "universal empire" will have a federal organization, is brought out, but, since he gives the state precedence of sovereignty,

[1] Bluntschli, pp. 26, 31, 32.

he could not logically consider World Sovereignty as existing until the World State is *in esse*. Accepting the conclusions reached in the previous Notes that sovereignty is coexistent with the community, and that the state is one of the manifestations of sovereignty, it is impossible to recognize the Community of Mankind without acknowledging the existence of World Sovereignty.

INDEPENDENCE OF STATES

This sovereignty, which as yet lacks positive and direct expression, may be seen by a survey, from the broader point of view, which has been assumed of the external sovereignty of a state. Independence is the outward manifestation of such sovereignty. As was said in the *Note upon Independence*,[1] real sovereignty in a state must possess that attribute. This assertion needs no further proof of its correctness than the statement. When sovereignty is viewed from within the State, it is easy to understand and evident in the various phenomena of society; but, when two or more states, each with an independent sovereign, come into opposition so that the wills of their sovereigns do not harmonize, and each sovereign attempts to be independent and to exercise exclusive sovereignty, the state of affairs resulting is paradoxical, for manifestly two supreme authorities cannot exist within the same sphere.

Take, for example, the specific instance of two states territorially contiguous, one of which is physically stronger than the other and could, if it so willed and was not prevented by other states, destroy the sovereignty of its weaker neighbor by depriving it of independence.[2] In the instance given, is not the weaker state *dependent* upon the volition of the more powerful for its independence? Or, if the more powerful is restrained from aggression by the fear that other states might intervene, is not

[1] *Ante*, p. 37.

[2] In this and in subsequent places where the sovereignty and independence of a state are spoken of, the phrases are used for the sake of brevity. In all such cases it should be understood that the sovereignty and independence of the sovereign of the state are intended.

the weaker state *dependent* upon the combined physical force of these other states for its independence? Can there be such a thing as *dependent* independence? Under such conditions, what becomes of the *reality* of the independence of the sovereign of the weaker state, and what becomes of the *reality* of its sovereignty?

The answers to these questions are obvious. The idea is thus stated by Bluntschli: "If a State is compelled to recognise the political superiority of another, it loses its sovereignty, and becomes subjected to the sovereignty of the latter."[1] And again: "If a State were responsible for the exercise of its sovereignty to another State, its sovereignty would thereby be limited."[2] The conclusion is that, no matter how *real* sovereignty in a state may be when viewed from the standpoint of the state itself, *it is not real in fact but artificial* unless the sovereign of that particular state possesses the physical force which, if exercised, can compel obedience from all mankind throughout the world. Doubtless the sovereign of the Persian, the Macedonian, or the Roman Empire, as each in its turn attained the zenith of its glory and might, may have reasonably claimed real sovereignty even in the broader sense and maintained the claim against the united strength of all other peoples; but in later centuries the Saracens, Charlemagne, and Bonaparte attempted and failed to establish an empire and obtain universal sovereignty. In the past one hundred years no state has become so

[1] Bluntschli, p. 506.

[2] *Ibid.*, p. 509.

"According to the definition of independent political society which is stated or supposed by Hobbes in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But if power to maintain its independence by its own intrinsic strength be a character or essential property of an independent political society, the name will scarcely apply to any existing society, or to any of the past societies which occur in the history of mankind. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations." Austin, p. 234.

powerful as to hope, much less has had the temerity to assert, that it could hold its sovereignty supreme and independent against a coalition embracing the other states of the world.

ARTIFICIAL CHARACTER OF SOVEREIGNTY IN A STATE

It is evident from the foregoing that the sovereignty in every modern state lacks the essential of real sovereignty, namely independence. Sovereignty, as it exists in a state, stands in much the same relation to the supreme might of the world that civil liberty stands in relation to the sovereign power in a state. From the broader point of view, therefore, the sovereignty in a state is dependent upon the collective physical force of mankind, or rather upon the collective will of those, whether considered as political groups or as individuals, who possess the preponderance of such force, and who are because of such possession actually independent. In the case of this dominant body all the essential qualities and attributes of real sovereignty are present, but it is unorganized, undetermined, and necessarily variable, composed of a multitude of individuals who are members of numerous states and offset against one another by race, national allegiance, and other differences. But *what* individuals and *what* states enter into the composition of this sovereign body are equally uncertain from the fact that this World Sovereignty has never been directly exercised by the possessors or by an agent directly authorized by them to carry out their sovereign will.

The artificial character of the sovereignty in a state when compared with the reality of World Sovereignty, while demonstrable by abstract reasoning, may be also proved by reference to concrete facts.

History furnishes numerous instances of the loss and restoration of sovereignty in a state—lost through the exercise of physical force external to the state and superior to that within the state, and against the will of the sovereign of the state; and restored by the voluntary act of the possessor of the superior external force or under the coercive influence of other external forces, and not by the physical might within the state itself. Such evidence is conclusive of the fact that the sovereignty in a

state is artificial and that the independence of its sovereign, though asserted by it and acknowledged by other states, is not real and self-maintained.

To illustrate the force of this evidence, a few examples will suffice.

An event in recent history belonging to this particular class of proof was the result of the Franco-German War in 1871. After French sovereignty and independence had been swept away by the victorious armies of Germany, the sovereignty and independence were restored by the conquerors in exchange for the undertaking of the French Government to pay a large war indemnity and the cession of Alsace-Lorraine. This restoration was the voluntary act of the possessor of a physical force proven by actual demonstration to be superior to any such force within the French state. Clearly the sovereignty and independence of the latter rested for their continuance upon the will of the victor, or possibly upon the fear of Germany that continued possession would arouse the hostility of other European Powers. In either case, French sovereignty and independence lacked reality and were manifestly artificial.

A similar example of conquest and restoration was presented in the war between the United States and Mexico. The military forces of the United States overthrew the Mexican Government and acquired the sovereignty of the republic, but it was voluntarily restored upon Mexico agreeing to certain conditions. Mexico could not have secured such restoration by its own power. Mexican sovereignty was, therefore, dependent upon the will of the conquerors; and, since it was dependent and not independent, it was artificial.

Another class of historical evidence, cumulative but not identical with the preceding, is that which is presented by the existence of such states as Belgium and Luxemburg, which have sovereigns apparently independent and supreme, because the sovereigns of the great European Powers by mutual agreement permit such independence upon the express understanding that in case of wars between the guarantors these states shall remain neutral.

None of these neutralized states possesses in itself sufficient physical force to maintain even for a brief period its sovereignty and independence in case it should be attacked by one of its powerful neighbors. They rely upon the jealousies existing between the surrounding nations to preserve their political and territorial integrity. Clearly the sovereignty in a state of this sort depends upon the collective will of foreign sovereigns, or upon their several sovereign wills acting separately but harmoniously to secure the same end.

Further evidence of the same character is derived from the political status of certain of the Balkan States and Hawaii prior to its annexation to the United States. It would be irrational to claim that in any one of these so-called independent states there is a sovereign capable of maintaining independence solely through the possession and exercise of physical force. It is evident from their history and from their present condition that such states exist as distinct self-governing communities solely because other states, whose political and commercial interests are involved, cannot agree that any of their number should extend its dominion over the territory of the lesser states and absorb its sovereignty over their people.

Similar proof may be seen in the present international condition of Turkey and China, whose helplessness among the nations has been long a recognized political fact, though it may not continue in the future.

The Turkish Empire, differing so widely in its governmental system, moral standard, and religious belief from the Christian nations of Europe, which are vastly more powerful than it is, continues as a so-called sovereign and independent state because of the rivalries of the European Powers, which view with distrust and disfavor any manifestation by one of their own number of an intent to deprive the Ottomans of their sovereignty. Concerted action by the civilized Powers has become the established policy of Europe in dealing with Turkey.

The present physical weakness of China in spite of its immense population and great resources was demonstrated a few years ago during the Boxer outbreak. When at the close of that

extraordinary event the Imperial Government was reestablished and Chinese sovereignty was restored by the victorious allies, that sovereignty was clearly dependent upon the consent of the various Powers, whose forces occupied Peking. That they voluntarily surrendered the sovereignty to the Chinese was because they preferred that it should be retained within the Chinese state rather than that it should be held by one or more of their own number who would become thereby dominant in the Far East. Again selfish interests are shown to be the controlling factor in maintaining the political independence of a state physically weak.

In fact, the conflicting ambitions and mutual suspicions of powerful nations, neutralizing each other and forming a constant menace to the covetous and aggressive, keep in equilibrium the political condition of the world, becoming thus the uncertain preservers and guardians of helpless states. The European international doctrine of the Balance of Power and the American national policy of the Monroe Doctrine are practical manifestations resulting from this universal spirit of international distrust, which is so potent a factor in the politics of the world.

From these illustrations it is apparent how artificial are the sovereignty and independence which are assigned by international usage to a state, feeble and powerless though it be to repel the hostile act of any one of the great national states of the world.

As has been said, no single state, however vast its resources and population, could under existing conditions successfully withstand the combined and organized opposition of the rest of the states in the world, any more than one individual member of a modern state could maintain his absolute liberty against the collective will of his fellow members. In each case superior physical strength is lacking to the individual state or person, and without superior physical strength the result cannot be accomplished.

It may be said then that every state, whether strong or weak, whether great or small, whether rich or poor, whether civilized or barbarous, is in a sense a protectorate, a ward of the other

states of the world, holding its political powers of them and responsible to them for its international conduct. In a word, every state is a member of the *Community of Nations*, wherein resides World Sovereignty, and which in the fullness of time will become, through the positive expression of that sovereignty, an organized political union, a *Federal World State.*

EQUALITY OF NATIONS

Having reached this point in the discussion, and having seen that a bond of interdependence makes of the states of the world something more than a mere collection of separate and independent units, each moving irresponsibly in its own distinct sphere; having seen that they in fact form an embryonic political state, analogy to the fully developed type of the state previously considered offers a reason for the hypothesis so universally adopted by publicists and governments, that *every nation is the equal of every other nation in the world.* From the consideration given to the character of independence and sovereignty in a state, it is evident that this cannot be an *actual* equality, a fact which has been forced upon some writers who have attempted to explain it by limiting the subject of equality, but the result has been destructive of the value of the assertion.

For example, the modification of the hypothesis by Lawrence is unsatisfactory although suggestive of the fiction on which it is founded. He says: "From the time of Grotius to the present day publicists have declared that all independent states are equal in the eye of International Law. The equality they speak of is not an equality of power and influence, but of legal rights."[1] Equality of this nature is purely ethical, for rights unsupported by actual power are only moral precepts, which may possess influence, but never positive force. An equality among sovereigns to be *real* must be an equality of might, otherwise it is artificial, an intellectual creation.

Nor can the equality of states affirmed by Wheaton, nor the sovereignty to which he refers, be considered *real*, even from his

[1] Lawrence, *Principles of International Law*, p. 241.

own statement, in which he says: "The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils."[1] It is manifest that with such sovereignty as this, the equality and independence of sovereigns are entirely artificial, resting only upon a legal assumption. It is this assumption which analogy explains.

In discussing sovereignty from the point of view of the state, it was shown that in times of domestic peace individuals having certain qualifications attained through development are presumed to possess an equal share of the sovereignty of a single state, and that the same is true of states which as units composing a federal state are presumed to share equally in the federal sovereignty. The fiction of this assumption is proven when tested by the exercise of physical force, the ultimate appeal of the real sovereign. Since a war between two, three or four nations is no more destructive of the general peace of the world community than a conflict between a few individuals in a state is destructive of its domestic peace, the persistent international condition is that of peace, as no conflict of modern times has been of sufficient magnitude to constitute a World War, thereby imposing upon the Community of Nations a general condition of belligerency. As a result the assumption of equality in the possession of sovereign power during times of peace in the world, when a state possesses certain qualifications, such as a recognized sovereign and an organized and operative government, is never withheld from such a state in international intercourse.

It should always be borne in mind, nevertheless, that the equality of individuals in a state, the equality of states in a federal union, and the equality of nations in the Community of Nations are all artificial and based upon assumed qualities which can only be tested by the actual exercise of physical force. It is true that a war between two states may demonstrate the relative amount of real power possessed by each, but, since the *world* is at peace, they remain to neutral states presumptively equal until the sovereignty of one is actually absorbed by the

[1] Wheaton, *International Law*, p. 45.

other. It matters not how great is the contest or how decisively victorious one of the belligerents may be, to the rest of the world the assumption of equality continues unaffected, for general peace prevails.

Thus, although the Community of Nations lacks the organization essential to make of it a political state, the individual nations, by general though independent consent and not by direct command of a World Sovereign, employ that fiction of equality which in a state relates to the possession by individuals of the sovereignty. In the Community of Nations this is applicable to the equality of nations in the possession of the World Sovereignty. This assumption, so firmly imbedded in the Law of Nations, is a conscious or unconscious recognition of the unity of the states of the world in the possession of a universal sovereignty; and it is, furthermore, a manifestation of the tendency of modern thought towards an organized World Community.

SUMMARY

To summarize the conclusions reached:

First.—There is possessed by a body of individuals in the world the physical might to compel absolute obedience from all other individuals in the world considered collectively, and from all individuals in the world considered separately.

Second.—This all-powerful body of individuals possesses therefore the real sovereignty of the world, the world being considered as a unit or a single and universal community.

Third.—The sovereignty in every state as now organized politically is artificial when viewed from the standpoint of the world as a single community; and such sovereignty depends for its sphere of operation and exercise upon the will of the body of individuals possessing the World Sovereignty.

Fourth.—Since only the sovereignty existing in a state has been directly exercised, World Sovereignty has not up to the present time been positively expressed. It remains passive through lack of harmony of purpose and unity of

action by its possessors, and through the absence of proper channels of expression.

Fifth.—The nature of World Sovereignty in its present state of development is similar to that of the lesser sovereignty, which viewed from the standpoint of the community or state is real. The condition existing is analogous to that in a community, wherein the real sovereignty has never been exercised although its existence is certain. Such a community is unorganized, for organization is a positive exercise of real sovereignty.

THE LAW OF NATIONS

The definition of *a Law* given in the Note in which was discussed the relation of sovereignty and law in a state was "A rule of human conduct emanating from the sovereign." In adapting this definition of Law in its relation to World Sovereignty there is presented this difficulty: the Community of Nations, being unorganized, that is, without a government, and therefore without an agent of the sovereign to formulate in terms and formally proclaim rules of human conduct, the will of the World Sovereign cannot find expression through the usual channel of enacted law, by which the sovereign will is announced in a state.

As a result of this condition, arising from the non-existence or non-development of a government in the Community of Nations clothed with legislative authority, the question may be reasonably and consistently asked, whether or not the body of rules known as the *Law of Nations* or *International Law* is in fact law in the common legal meaning of that word as applied to the rules of conduct issuing from the sovereign of a state, and can it be properly classified under that head.

As has been shown, there must exist from the nature of human society and the constant intercourse between nations a World Sovereignty, and necessarily a World Sovereign. A law to be law according to the definition given in these Notes must have sovereign authority behind it, whether it be a moral law given

by a divine ruler or a statute law uttered by the governmental agent of the sovereign of a state. The Law of Nations, that is, World Law, must therefore emanate from the World Sovereign if it is indeed Law properly so-called. Since the will of the World Sovereign fails in positive and direct expression, it is necessary to determine, first, what that will is in regard to human conduct in the world, and, second, whether the body of rules which governments and publicists recognize as the Law of Nations, coincides with and actually expresses such sovereign will. If it is thus coincident and expressive then it is law in the legal sense; if it is not, then it is law only in name and not in fact.

NATURAL JUSTICE

It has been seen in the Note upon Law in a State,[1] that law arising through the decrees of judicial tribunals, when not interpreting enacted laws, is based upon the rational presumption that the sovereign of the state is persistently desirous of directing human conduct in accordance with the principles of natural justice. Thus, although a case may be entirely novel, it is assumed by a municipal court, in the absence of enacted laws applicable to such case, that the sovereign will is in harmony with the principles of natural justice, and the court applying those principles as it understands them renders a decision, and by that act makes known the will of the sovereign and announces the law, since the passive acquiescence of the sovereign is equivalent to a command. The point to be noted is, that the law existed without formal enactment, the court being merely the agent for its announcement in terms.

It is upon a similar presumption and assumption that the great body of the Law of Nations is founded. The conditions in a state and in the Community of Nations are analogous. The principles of natural justice or absolute justice or strict justice (whichever name most accurately defines the moral intent to be constantly righteous towards others) are by civilized states assumed to be in accord with the dominant sentiment of the

[1] *Ante*, p. 51.

human race, that is, with the presumed will of the World Sovereign, except so far as repeated practice between governments has established a custom, in which case, as in that arising in a state, the custom overrules the abstract principle of natural justice. *Consuetudo vincit communem legem.* By these precepts sovereigns and their agents ought to be guided in their intercourse with one another as if the will of the World Sovereign had been declared in the exact terms of enacted law, even as in a state an individual is bound to respect the principles of natural justice in dealing with his fellows as a moral and political duty.

Under the English juridical system the source of the Common Law and of the Law of Nations is recognized as resting on the same assumption of sovereign intent, and the latter is on that account given legal force in the municipal courts of England. Blackstone says: "The Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the common law, and is held to be a part of the law of the land."[1] Thus, under the English system the principles of natural justice are applied both internally and externally to the state in the regulation of *all* human relations. A similar recognition of the legal character of the Law of Nations appears in the Constitution of the United States, though it was undoubtedly but the principle expressed by Blackstone reiterated.

CHARACTER OF THE LAW OF NATIONS

These rules of international conduct, which from the nature of their source are necessarily ethical, may vary according to the interpretation which is given to them; and, since there is no constituted authority representative of the World Sovereign to declare and apply them, the meaning placed upon them is dependent upon the moral standard of the sovereign of a state who invokes and sanctions them. These variations find expression in the practices and utterances of governments, and coincident interpretations are frequently set forth in treaties. Treaties

[1] Blackstone, Bk. 4, ch. 5.

however, like customs, may form numerous variants of these principles; and though presumed to interpret the will of the World Sovereign, they are not necessarily reasonable, just, or ethical any more than are the customary law and the statutory law emanating from the sovereign of a state.

The relation of Treaties to the Law of Nations is well analyzed by Madison. He says:

> They [treaties] may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which case they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations.[1]

Until an established custom or usage of nations is changed, or the utterances of governments are disavowed, or treaties are denounced or permitted to lapse, the sovereigns of the states accepting them are bound by them or assumed to be so bound; but, like customary and statutory laws, these may be modified at will by the sovereign, and are similarly unstable and subject to variation as the relations between nations are affected by new conditions resulting from political and commercial changes and the influences of a progressive civilization upon international morality.

THE LAW OF NATIONS IS LAW IN THE LEGAL SENSE

From the foregoing consideration of the origin and character of the Law of Nations, it will be seen that it possesses the essential features of law as found in states, and particularly that branch of law which arises from the same source, natural justice; and, though but partially developed through the lack of an established central government to act for the World Sovereign

[1] Quoted in Wheaton's *International Law*, p. 23.

and to make formal declaration of the sovereign will, it has a quality of legality which is recognized and acknowledged by civilized states.

Civilized states, like civilized persons, recognize the need of law to regulate their intercourse and to preserve social order. Because a law issuing from a proper authority is not enforced, that fact does not deprive it of its legal status. It still remains a law until annulled by a definite expression of the sovereign will. The same is true of the rules of human conduct that originate in natural justice, and which are recognized by the individuals in a state as legally binding, even though they may not be enforced. They still remain laws in the legal sense.

Turning now to the wider field of the Community of Nations and the application of those principles of natural justice which affect the intercourse between nations and which are presumptively the will of the World Sovereign, the same proposition holds good. The fact that these principles are not enforced by a governmental agent directly delegated by the World Sovereign does not deprive them of their legal character or effect. They remain laws, and constitute a code of rules and a standard of right and justice, by which the external conduct of states should be judged, and in harmony with which governments should mould their foreign policies.

Without a superior, supernational government, the sovereign of each state becomes the censor of its own conduct, the self-constituted agent of the World Sovereign to carry out the sovereign will in so far as that will applies to itself, its government, and the members of its state.

DEVELOPMENT OF CERTAIN LAWS OF NATIONS

It is natural that along certain lines of conduct there has been a more general recognition of the collective will of the world than along others, and that as a result in regard to certain subjects the desire and intent of the World Sovereign have received a like interpretation by all civilized states. Such universal interpretation and application approximate, if they do not coincide with, enacted law.

Two prominent illustrations of this fully developed type of the Law of Nations may be cited; one, the universal declaration that piracy is a crime against the world; the other, the right and duty of all states to suppress the slave trade, which is a crime against humanity. As to the criminality of these practices the sentiment of civilized peoples is today a unit.

Piracy has been for ages condemned in word if not in deed. "*Pirata est hostis humani generis*" wrote Coke,[1] though at the same time the Elizabethan seamen with piratical license were plundering the ships and colonies of Spain. The history of the Buccaneers and the exploits of the Barbary corsairs show that until a comparatively recent time there was so great a lack of harmony in idea and action by nations that there failed to be an effective expression of the will of the World Sovereign. With the beginning of the nineteenth century, however, the opposition became so universal that piracy practically disappeared from the seas, except on the western side of the Pacific.

In the case of the slave trade, the legality of the traffic was generally accepted until the outburst of the spirit of individualism toward the close of the eighteenth century caused the civilized states of Europe to change radically their views upon the subject. Less than a hundred years ago the slaver plied his trade with little fear of molestation; and, although in a few states the traffic was denounced as immoral and by legislation declared criminal, there was no such general condemnation by the powerful states of the world as to warrant a government to extend its suppressive operations to others than its own nationals.

Under the influence of new ideas as to the rights of man and following the initiative of Great Britain, a new sentiment toward the institution of slavery became ascendant, and Christian states with practical unanimity prohibited their members from engaging in the trade, and by treaties agreed to suppress it upon the high seas. So universal was this prohibitive policy and so extensive were the treaty powers conferred, that there could be no reasonable doubt but that the moral sentiment of those controlling the physical strength of the world was hostile, not only to

[1] 3 *Institutes*, 113.

the slave trade, but to slavery as well. This union of action and harmony of idea found definite expression in joint conventions by the principal nations of the world in 1885 in the Berlin General Act, and in 1890 in the Brussels General Act, by which they mutually agreed to suppress the trade both on land and on sea. The sentiment of those possessing the World Sovereignty is but another name for the World Sovereign's will under the influence of ethical principles, and the treaty recognition of such sentiment is but the formal interpretation and political sanction of such will.

As a result of this attitude of mankind toward these two great public crimes, the one destructive of the institution of property, the other, of personal liberty, piracy and the slave trade wherever practiced are subject to punishment by any political authority apprehending the persons engaging therein irrespective of their nationality or allegiance. In a word, the pirate and the slave-trader are world-outlaws, and have been so declared by the manifest will of the World Sovereign.

INCREASING RECOGNITION OF WORLD SOVEREIGNTY AND WORLD LAW

The international adoption of policies like those relating to piracy and the slave trade is a manifestation of the existence of a sovereign will in the world, which is supernational and supreme. It is suggestive of the possibilities of the future. The influence of the collective opinion of nations operating throughout the Community of Nations compels state after state to recognize the superiority of World Sovereignty over the sovereignty in a state and consequently the superiority of law emanating from the higher authority over the municipal legal codes of states. This influence is forcing political rulers of nations to submit to the dictates of the World Sovereign rather than to incur the condemnation, if not the hostility, of the great civilized states, the most powerful and most influential members of the Community of Nations. Thus far such disfavor is the punishment which follows the violation of those rules of the Law of Nations, the

interpretation of which is substantially undisputed and which are confined chiefly to humanity of conduct.[1] The fear of this disfavor or condemnation, though not an actual force, has become a powerful influence in directing international intercourse.

As yet such declarations of the sovereign will relate to that great common possession of mankind, the high seas, or to the conduct of hostilities between belligerent states in the futile attempt to make war humane. But such historical events as the intervention by foreign Powers in behalf of Greece in 1827 and in behalf of the Christians of Mount Lebanon in 1860, and the menacing protests of the great nations to the Ottoman Government against the treatment of the Armenians, are declarations of executive authority superior to national authority assumed in the name of humanity—or more properly in the name of the World Sovereign—which indicate a more perfect unity among nations for the enforcement of the sovereign will of mankind.

DEVELOPMENT OF GOVERNMENTAL FUNCTIONS IN THE COMMUNITY OF NATIONS

The beginnings of the three distinct branches of government in a state, as it emerges from the chaotic condition of barbarous individualism and becomes a political organism, seem to be simultaneous. The mind cannot conceive of the determination, the interpretation, and the application of the sovereign will being separated in the expression of sovereignty. That is, the expression of sovereignty, though it be a single and distinct act, necessarily involves the three functions of political government of which all relate to law. Therefore, whatever may be the development of one branch of government, the other two branches should be in a similar state of development. If the legislative method is crude and simple, the executive and judicial methods will be equally crude and simple; and, conversely, if the legisla-

[1] "The duties which are imposed by these rules [of international morality] are enforced by moral sanctions, by apprehension on the part of sovereigns and nations of incurring the hostility of other States, in case they should violate maxims generally received and respected by the civilized world." Wheaton, preface, p. cxcii.

tive method is complex, the executive and judicial methods will be found to be complex. The three branches and functions of government develop along parallel lines.

This is illustrated in the present stage of the evolution of World Sovereignty, which, being in the process of political formation, is simple, crude, and almost barbarous. In the Community of Nations, selfish individualism controls the actions of states. The executive function is rudimentary, giving but occasional and feeble evidence of existence. The judicial function is unformed; in its place is the barbaric method of trial by combat, or the more rational though primitive mode of voluntary submission to arbitration. And the legislative function, though giving evidence of development in the increasing number of international assemblages, is supplanted by the assumption that the will of the World Sovereign coincides with customs, usages and the principles of natural justice.

THE LAW OF NATIONS, A COMPLETE LEGAL CODE

Until the time is ripe for the establishment of a central government to announce, interpret, and enforce World Law, the express will of the World Sovereign, the Law of Nations will lack that great branch of Constitutional Law which relates to the form, powers, and duties of government. It, however, contains that other branch of Constitutional Law which in a single state deals with civil or individual liberty, and in a federal state with state liberty. In the Community of Nations this branch of law relates to national independence. With this exception as to governmental institutions, the Law of Nations is as complete in subject-matter as the body of Municipal Law in the most highly developed state, though there is wanting that consistency and harmony of interpretation and application which are the products of sovereignty when exercised through the agency of a fully organized and permanent government.

Resting upon natural justice, like the Common Law of England which furnishes a complete body of laws applicable to every relation existing in human society, the Law of Nations is equally

complete in its rules as to the relations existing in the society of nations. The rules of the Common Law, however, though limitless in source and application, require two things before they can be declared in terms—first, a controversy as to rights, and, second, a judicial determination of such controversy. It is not so with the rules of the Law of Nations; they may be and are declared by publicists and governments in the abstract without concrete cases arising. Thus, in one sense the International Code is much more comprehensive and complete than the Common Law, though in fact the controversies between individuals are so numerous and so varied that a case is hardly conceivable in which the principles involved have not been passed upon and declared by the courts. The result is that the Common Law as it exists today is founded almost entirely upon precedent, while the Law of Nations is based immediately upon morality, equity, and reason, those qualities which should be preeminent in the Universal Sovereign of mankind, the perfection of whose will should find manifestation in the laws emanating from the highest political authority in the world, a code perfect in righteousness.

A DEFINITION OF SOVEREIGNTY[1]

The consideration of a subject like "Sovereignty" leads a man, who has had little cause to study such questions in the abstract, into an unwonted field of thought, where he finds himself involved in a maze of theories, which, in their application at least, are confusing on account of the different premises and concepts upon which they rest.

I realize that it is more or less presumptuous for a layman in political science to enter this field of philosophy with the purpose of contributing anything to the general knowledge of a subject, into which many of those here present have gone much further and much deeper than I have been or can ever expect to go in the formulation and application of a correct definition. Having, however, in a moment of unwisdom set my hand to the plow I will not look back, nor will I offer apology for what I have to say on the ground that it will be the utterance of inexperience, warranted as I would be in making such a plea.

The thing, which has especially impressed me in my examination of the writings of publicists on the nature and sphere of sovereignty, is the artificial character of the theories, which have been advanced, and of the methods of treatment, which have been generally employed. This seems to be true whether the writer is dealing with sovereignty alone or as a part of a theory covering law, jurisprudence, or political institutions. Frequently too a theory is founded on a legal fiction, which will not stand the test of fact.

Apparently the process of thought adopted in many cases by the advocate of a theory is to formulate the theory first and then to seek out historical facts to support his preconceived ideas, unduly omitting facts in opposition or moulding them to meet his views.

To one, whose experience has been in the practical rather than

[1] Reprinted from *The Proceedings of The American Political Science Association*, 1913–1914.

the theoretical field of law, such a method of theorizing appears to be highly unscientific and prejudicial to the truth. Heaven knows that the science of law, in theory and in practice, is already sufficiently burdened with a reputation for relying upon fictions, so that those, who teach and practice it, ought to be specially careful to avoid artificial premises in the construction of theories. We live in a utilitarian age, when the actual and practical dominate human thought. Men today want a theory which works, which stands the test when applied to facts, which is not perforated with exceptions. Theories of that sort win the approbation of mankind, while the old type of theory, however adroitly reasoned, is viewed with suspicion. It seems to me that we ought to eliminate fine-spun logic and attenuated argument, those shreds of mediaeval philosophy which still persist and tincture modern thought with assumption and unreality. We should see in the popular reception of Pragmatism the spirit of the times and deal with things as they are rather than with things as they might be.

Following the normal course of thought then (and I mean by "normal," unrestricted by limitations imposed by a particular type of theory), we may begin the present discussion with the proposition that a political energy or a political institution finds its origin in such causes as the association of man with man, the intellectual development of an age or race, the environment of a particular community. So, too, the concept of a political energy or a political institution should be based primarily upon attributes founded in nature rather than upon those founded in theory, attributes, which can be applied universally to social conditions regardless of the state of social development or the recognition of law as a political force.

No doubt it will be charged that the foregoing method of treatment results in confusing sociological and legal theories and that their spheres should be kept distinct. From the viewpoint of the specialist this may be true, but it can in no way affect the value of a theory to the practical thinker, who in his search for the truth follows the facts into whatever path they may lead him.

To illustrate in connection with our present subject: It seems to me of very little value to assert as a condition precedent that Sovereignty shall be considered as a concept of law (I do not here differentiate between constitutional and international law), that it is a legal creature functioning through law and is at the same time a source of law. I presume that it is too great regard for practicality, which prevents an appreciation of the logic of this proposition; if so, I plead guilty. It reminds me very forcibly of the old riddle, "What would be the result if a snake began to swallow his own tail and kept on swallowing?" How a thing can produce and at the same time be the offspring of another thing is a problem, which I think would have vexed the Schoolmen of eight centuries ago, those philosophic gymnasts who delighted in propounding and discussing unanswerable questions.

Enough has been said to indicate that, in a consideration of sovereignty, no good purpose is served, in my opinion, by declaring that it is a subject which belongs to a particular branch of political science. To do so seems to me to place an arbitrary limitation upon its sphere of operation, a limitation, which, until it has been established by facts, is entirely hypothetical. I do not say that such a limitation does not exist. It may exist. But, if it does exist, let it be proven rather than assumed as a basic hypothesis, to which the facts must be made to conform.

It seems to me that the practical mode of considering a subject like the present one, is to determine its nature from political phenomena, to seek for its natural rather than artificial qualities, to widen or contract its sphere of exercise so that it may apply generally as to time and place—in a word, to give to sovereignty a meaning, which accounts for certain manifestations in a politically organized community which would otherwise appear to deny the normal rule of cause and effect.

In pursuing this method it is evident that simplicity of form in communities and political institutions is preferable because of the facility of analysis; and it is also evident that this simplicity will be found in the barbarous state of human society. Necessarily this leads us into the domain of sociology.

A primitive community originates in the gregarious impulse

inherent in human nature rather than from any process of reasoning by the individuals, who compose it. It is the physical, not the intellectual, in savages, which causes them to associate. Animal passions, fear, and the chances of birth and situation are among the primary causes. Later, as a community increases in numbers and civilization, there is evidenced an energy, which with more or less tenacity keeps the members of the community united. This energy, which is in fact manifest from almost the moment of origin, is the controlling factor in a community giving to it continuance and a rudimentary political organization.

Like all that pertains to human society in a barbarous state this energy is physical; it is only in the higher stages of development that man permits his conduct to be affected by rational, moral and religious influences. This physical energy of the savage is necessarily strength of body. No other human force is known to the physical man. As in the case of gregarious animals a savage man, because of superior muscular development and vigor, compels his fellows in a community to submit to his will either by the employment of force or from fear of physical punishment. He commands and is obeyed because he can compel obedience.

This fundamental energy, which is the binding force in the most primitive forms of society and continues its functions, though modified by intellectual influences, in the higher types of communities, seems to me to be entitled to the term "sovereignty." We think of sovereignty—and I mean by "we" mankind in general—as the supreme and vital element in a political state, without which it cannot exist in an organized form or possess those other attributes, which enter into the concept of a state.

I do not ignore the fact that there has been a marked change in the idea of sovereignty held by publicists who have written since Bodin advanced his theory in the sixteenth century, a change due, I believe, largely to the influence of legalism and its increasing popularity during the eighteenth and nineteenth centuries. Change, however, is not necessarily progress. Indeed, not infrequently the earlier thinkers seem to me to have come

nearer the truth being unhampered by conventions and uninfluenced by the opinions of others. To discuss the merits of the different concepts of sovereignty which have been advanced in the last three hundred years would lead us unavoidably into a consideration of the political and legal theories of their authors, a field of investigation far too extensive to enter at the present time.

It will have to suffice for the purpose of this discussion to pursue an independent line of thought without reference to a particular theory and without criticism of the works of publicists, however authoritative such works have become.

Following, therefore, the proposed method of analysis by confining the present consideration to small communities with simple institutions and applying the suggested concept of sovereignty to the phenomena of life in such communities, it is apparent that the individual, who has the bodily strength to impose his will upon all the other members of the community, possesses the supreme political authority. View it from what point you will, give to the intellect, the emotions, the conscience, their highest place in influencing human conduct, and you must come back to the naked fact, confirmed by history as well as by reason, that political mastery depends upon the physical power to coerce.

I cannot attempt here to trace the phenomena of political existence from those of the primitive tribal community up through those of the more complex types, which have developed patriarchal, patriarchal-tribal, monarchic, democratic, and representative systems of government, and show how in each type physical might continues to be the fundamental energy in spite of the restrictions which art has attempted to place upon it.[1]

This I know can be done, but I must ask you now to assume it as a fact, and pass to the consideration of a question, which has reasonably been asked by those who are opposed to the idea that the essence of sovereignty is physical power.

[1] An application of this concept of sovereignty to various forms of government and the development of the theory of a real and an artificial (legally created) sovereignty in a state will be found in "Notes on Sovereignty in a State," *ante*, pp. 1, 29.

The question is this: Should not the term "sovereignty" be applied to the supreme *will* in a political state rather than to the supreme *power?*

This is manifestly a fair question, and one which disciples of that school of philosophy which considers law to be as all-pervading in human society as electricity is in nature, will answer affirmatively. Sovereignty from their point of view could hardly be considered anything other than the supreme will in a state. Supreme will, when declared, becomes law; and law thus becomes dominant in the state being the only channel through which sovereignty can find expression.

While appreciating the force of this concept of sovereignty, and understanding, I believe, the influence of the word "law" upon those who advocate it, the weakness of the definition of sovereignty as "will" lies, in my opinion, in the artificial type of supremacy which it is necessary to assume if it is adopted. What is it which makes a particular will supreme in a state, whether it be considered the will of a person, a body of persons, or the state as a juristic person? Can it be anything in fact other than the power of the one who wills to compel obedience? I know that it may be asserted that supremacy of will depends upon legal right, but who can proclaim a legal right except the supreme will? You see we get back to the old question of the snake swallowing his own tail the moment we introduce law as a source of real superiority. But, if law is not the source, there appears none other in human society save physical might.

This conception of the supremacy of brute force in a state may appear to be a barbarous doctrine distinctly out of harmony with the modern spirit, which exalts law above every force in society and considers all political phenomena to be produced by it or subject to it. "The reign of law" is an agreeable phrase to the present generation and the idea which it conveys, is given a preeminent place in modern thought. On the other hand, the suggestion that physical strength dominates law and right in the political life of the world is displeasing, if not abhorrent, to the moralist as well as the legalist of the present day. But, however strong may be the prejudice in favor of law as a positive force,

it appears to me impossible to avoid the conclusion that the legal right to exercise the supreme will over a community fails to confer upon its legal possessor a real supremacy, unless the possessor of the physical power permits such exercise. When that permission is granted, either positively or passively, is not the will of the possessor of the physical power actually supreme, whatever may be the legal fiction as to the right to exercise the supreme will?

It is axiomatic that will must be exercised in every act of sovereignty, however it is defined, but will cannot be exercised without the consent of the one possessing the physical power to choose between obedience and disobedience to such will. Consent itself is an act of will. The consent of the physical master is an act of the will, but the will of the master. Whatever may be the legal *status* of the one who wills, the supremacy in fact rests with the one who is the stronger physically. That a man or a body of men in a community can possess the supreme might and not possess the supreme will appears to me to be paradoxical.

Thus, whether the supreme political authority is considered to be a manifestation of will or a manifestation of strength, the proposition stands that such authority belongs to the possessor of the superior physical might. To me the word "sovereignty" conveys an idea of completeness, of sufficiency, of unrestricted domination, of an authority from which there can be no appeal, so that I cannot dissociate supremacy of will from the power to compel obedience.

I have no doubt that some of those present think that I have failed to give proper value to the concept of a political state as a juristic person and that what is meant in legal theory by supreme will is the supreme will of the state, and not the will of an individual or a body of individuals within the state. I realize that, from the point of view of the legalist, who would subject all political phenomena, even the state itself, to legal formulæ, this idea is in harmony with the general theory which he advocates.

With neither the idea nor the theory am I in accord. To hold the view that a state is a creation of law rather than a product evolved from a primitive community through a process of politi-

cal unification by means of human might appears to me to deny the results of actual experience and to adopt a fiction. The value of this assumption to legal theory is clear; in fact, if the theory of the paramount authority of law in human affairs is accepted, the idea seems indispensable; but applied to the proposition that a community as a political organism is the resultant of an evolution through natural causes it finds no place until by the exercise of sovereignty a legal system has come into operation and law has impressed new and more or less artificial relations upon the members of the community.

An organized political society, the result of natural development from the primitive community, may, even before legality becomes manifest, be said to possess supreme power and supreme will, because somewhere among its members there is an individual or a body of individuals who has the physical power to impose his will or their collective will upon all the persons and over all the territory of the community. Whether the individual or the body of individuals acts directly or through an agent his announced will becomes the law of the community. If the possessor of the supreme power chooses to give the state a specific legal character and to declare it to have certain legal attributes, such character and attributes exist so far as the members of the state are concerned; but clearly their existence is legal rather than actual, a product of the human mind rather than of nature.

Eliminating the idea of corporate possession, because it appears to be a legal proposition and not a fact, it is evident that the *locus* of the sovereignty in a state can only be truly determined by the exercise of physical power between opposing individuals or factions, that is, by matching strength against strength. Such a contest in a small community of savages might be a single combat, but in large communities it would be a civil war or else, if by threat of violence, a bloodless revolution. Thus, the possession of the sovereignty in England was manifested when the lords and barons compelled King John to sign Magna Charta, when the people during the Puritan revolution wrested the government from the nobility, and when they again asserted their supreme political authority in the revolution of

1688. So in France the overthrow of the monarchy in 1792 and the destruction of the legal prerogatives of the aristocracy and clergy demonstrated that the French people possessed the physical strength to compel obedience to their will.

The Civil War in the United States is another historical event, in which the *locus* of the sovereignty was conclusively shown through an exercise of force. The method of determining in whom the sovereignty of the Federal State legally rested was provided in the organic law by furnishing a means of amending it. This method was ignored and those possessing the superior physical power established their supreme political authority by force. The legal right of a State to secede from the Union was tested, not by the constitutional process but by a resort to brute strength. The right of secession was denied by the possessors of the superior might and they manifested their collective will by compelling submission on the part of those who asserted the right. The denial of the right was never incorporated into the organic law by the process of legislation, but it was none the less established by an exercise of sovereignty that secession was illegal. And this act demonstrated the actual rather than the legal *locus* of the sovereignty in the United States.

From the point of view of those, who maintain that sovereignty is the supreme will of the state as a juristic person and that it is not the collective physical power of a defined or undefined body of individuals within the state sufficiently strong to compel obedience, the operation of the sovereignty, when a civil war is in progress, seems to be difficult of explanation. I assume that as plausible a theory as any is that the sovereignty of the state is, in its legislative operation, suspended until such time as domestic peace and order are restored and enacted law resumes its function in the regulation of human conduct in the state. This theory, however, does not remove entirely the difficulties of the situation. It appears to deny the supremacy of the legally sovereign will during the continuance of the war, for the act of suspension, if compulsory, disproves its supremacy. Remembering that the theory is that sovereignty is only manifested through law, one may pertinently ask: What laws con-

tinue to be in force during the period of domestic strife? What legislative authority exists? Does not the right to legislate depend upon the power to enforce? Is the mental power to will or the physical power to coerce the controlling factor in determining what is law in fact?

Viewing the situation from the natural in contradistinction to the legal standpoint, the physical strength of a faction, a party or a body of individuals in a state must be superior, and in asserting itself in actual conflict with those who deny such superiority, it furnishes conclusive evidence of its physical superiority, and by its exercise compels the acknowledgment that the collective will of its possessors is supreme.

My proposition, however primitive in origin it may seem, is this: That civil war, whether it is termed an insurrection, a rebellion or a revolution, is the practical process, by which the possession of the sovereignty in a state is determined as a fact, and that through no operation of law in time of peace can such possession be actually determined.

It may be assumed as a legal principle that sovereignty is possessed by all the individuals in a state considered as a corporate body, but domestic strife with the resulting entire or partial suspension of the operation of enacted law disproves the truth of the assumption. It is a fiction, which becomes evident the instant one party in a state denies by physical resistance that another party, which has been in control of the machinery of government, can compel obedience to enacted law. In one or the other party the actual sovereignty will be shown to reside by the outcome of the conflict.

When, however, domestic tranquillity prevails in a state and the physical energies of its members are turned into peaceful channels, the actual possession of the sovereignty cannot be subjected to the ultimate test. The physical might of one party cannot be measured with the physical might of another party without destroying that desirable condition of a state at peace, which is conducive to its industrial expansion and the acquisition of knowledge and wealth by its people. In these circumstances an artificial method of determining the *locus* of the sovereignty

becomes imperative, as there must be some means of selecting agents to announce and put into force rules of conduct, if political organization, public safety and private rights are to be preserved.

In the political systems of modern civilized states the method adopted, with but few exceptions, is to recognize the authority of majorities. It is generally accepted that "majority rule" is founded on the precept, that men are politically equal, but a critical consideration of the idea in the light of facts will, I think, convince you that it is based upon the assumption that each individual, who is by law granted political rights, is the physical equal of every other individual possessing similar rights. Sequent to this assumption is the further assumption that the majority of the individuals so empowered are possessed of the superior physical might in the state, that is, of the sovereignty.

Until recent years the limitation of the suffrage to males, who had attained manhood and presumably full muscular vigor, carried out in a marked degree the idea that physical qualifications were essential to a participation in the declaration of the will of those possessing the sovereignty in a state. The introduction of female suffrage into certain political systems (which there is not time to consider here) rests upon entirely different principles, which are fundamentally moral; nevertheless its introduction gives further evidence of the tendency in modern thought to supplant the more natural standards with those which are artificial.

History proves to us that the form of government in a state is usually determined by force, though in some instances by legal processes. In the former case a minority of the individuals in a state may and frequently does decide the form of government. In the latter case the majority of individuals being presumed to possess the power to compel obedience, their expressed will controls. Thus, the organic law of a state springs from a natural source or from an artificial source, as the physical power is manifested in fact or is assumed to be possessed.

In a state, where the form of government is representative or republican, the legal presumption, that the sovereignty is pos-

sessed by a majority of an electorate, which is limited in numbers by legally defined qualifications, is further shown by the choice of representatives and the delegation to them of powers to perform the necessary functions of government. That these chosen representatives are the agents of the actual possessors of the sovereignty is manifestly presumptive. It may or may not be true in fact. The law in times of domestic peace declares it to be true, but a successful rebellion may prove conclusively the falsity of the presumption by depriving the legally chosen representatives of the governmental authority delegated to them, while, on the other hand, an unsuccessful rebellion may convert the presumption into an established fact.

In the case of successful resistance to an existing government the practical result is that the law of its creation is repealed by force; the real possession of the sovereignty takes the place of the artificial possession; actuality supplants legality; fact destroys fiction.

But, whether it is a time of internal strife, when the actual possession of the sovereignty is manifest, or a time of internal peace, when the majority of an electorate are presumed to possess the sovereignty, the fact remains that a large number of the members of a state cannot exercise their individual wills since they are opposed to the collective will of the possessors of the sovereignty. Those who are in opposition must either obey, because of the superior strength of the dominant body or because of their voluntary submission to enacted law, or else they must put the question of the possession of the sovereignty to the test by forcibly resisting the declared will of those who claim to have the superior power.

If the foregoing reasoning is correct—and I wish to say again that it seems to be a brutal doctrine hostile to the popular idea of the supremacy of law in the civilized world—the following propositions are true: that all the individuals composing a state do not share in the possession of the sovereignty; that it is located *actually* in the body of individuals determined or undetermined, who possess the physical might to compel obedience to their collective will; and that it is located *legally* in a majority of a

limited electorate in a republic, or, in other types of states, in a special group of individuals designated by law.

As to the theory that a state as a juristic person possesses the sovereignty, it has to be assumed that it functions through majorities, but it must be understood that majorities are, when introduced into a political system, creations of law, and that they are not inherent in human society. To ignore a minority, which may be stronger physically than a majority and thereby able to put into operation its will in spite of the announced will of the majority, is to place legal supremacy over actual supremacy, to clothe the impotent with a fictitious power. It is the exaltation of law over physical might by crediting law with a superiority which it does not and cannot possess in fact.

It comes to this then, that a state, when viewed from within, certainly does not as an entirety possess the sovereignty, though it is possessed by certain individuals who are within the state.

Viewed from outside the state, however, a state, as I have said, may be considered to possess the sovereignty since its possession is within the limits of the state. It seems to me, therefore, that in a consideration of the relations between states it is not improper to speak of a state "possessing sovereignty" or to use the expression "a sovereign state."

The relations between states form the province of international law, and it is customary to speak of a state in its character as a subject of international law as "sovereign and independent." Independence is a condition essential to a state's legal equality with other states in the family of nations.

But what is this condition of independence other than a condition in which there exists among the members of a state a body of individuals who have the power to make their collective will supreme within the state? Independence is clearly but an external manifestation of sovereignty; that is, the possession of sovereignty within a state confers upon it internationally a legal condition of independence.

I know that it has been denied that sovereignty is a proper term in international law, and that it is asserted that it belongs exclusively to constitutional law, and that the fundamental

attribute of statehood from the external point of view is independence alone. I would like to discuss here the question as to whether independence is a condition in fact or one created by legal presumption, but there is not time to do so. I can only say that I do not at all agree with those who refuse to consider sovereignty a term of international law.

In the first place, since the condition of independence is a manifestation of the possession of sovereignty within a state, and, conversely, dependence is a condition which shows that sovereignty is not possessed within a so-called state, I can see no good reason for avoiding a normal process of thought by attempting to separate two ideas which are manifestly interdependent. In fact, I do not see how this can be done logically without assuming that sovereignty is a creature of law and that law is limited to the definition of John Austin that it is a command by a political superior to a political inferior.

In the second place international law deals with questions which arise when the sphere of one sovereignty conflicts with the sphere of another sovereignty, that is, when the possessors of the two sovereignties claim the same field over which their wills are supreme. The natural result of such conflicting claims is war to determine which sovereignty is actual over the subject in dispute, though modern enlightened sentiment, in order to avoid the loss and suffering incident to war, seeks to settle the respective claims by judicial process. In either case, however, the question to be determined is which sovereignty is dominant over the subject of controversy.

In the third place, when there is a dispute within a state as to whether the existing government does or does not represent the real possessors of the sovereignty and the *locus* of the sovereignty is subjected to the test of civil war, it becomes necessary for a foreign government to consider in what body of individuals within the state, where the war is being waged, the sovereignty is located. Having decided this question in accordance with its judgment, it recognizes as the true agent of the possessors of the sovereignty the government established by the one or the other of the warring factions. After such recognition, if a reasonable

doubt remains as to the *locus* of the sovereignty, a government may recognize the other party to the conflict as a belligerent. This recognition of belligerency permits the foreign government to regulate its conduct to the combatants by different rules from those applicable when belligerency is not recognized.

If, however, neither of the contending parties exhibit marked superiority in the conflict, so that the issue of the war is most uncertain, a foreign government may be justified in recognizing neither party as the possessor of the sovereignty, but wait to do so until one of them has established its claim by force of arms.

The decision in either of the foregoing cases as to the recognition of the governmental agents of one party or the other should depend upon the fact as to whether or not the party has established and can presumably maintain a stable government, possessing the power to perform its international obligations. Stability of government rests entirely upon the physical might to compel obedience and not upon a legal right to command, unless it is considered that "might makes right" in political affairs, a trite saying, which should not be too hastily rejected. Clearly the question is one of fact and not one of law. Who are the possessors of the sovereignty? What government represents the possessors? These are the questions which are presented to a foreign government, and upon the way in which they are answered depend the relations between the governments.

I consider it fair to ask those who deny sovereignty a place in international law the following questions: Whether the *locus* of sovereignty in a state should not be considered when a condition of civil war exists? In what manner are the spheres of conflicting sovereignties to be determined without considering their exercise and the points of interference? How in fact can independence be proved or even assumed for a state unless there is recognition of the exercise of sovereignty within the state?

The real cause of the limitation put upon the use of the term "sovereignty" seems to be, as I have already suggested, in adhering to the Austinian definition of law and in considering legal right preeminent in man's political relations. International law from the Austinian theory is not law in fact but merely a moral

code. Now, if we concede that sovereignty is a creature of law and only operates through law, and law is properly defined by Austin, it is evident that sovereignty can find no place in international law. But with this idea of the sphere of international law and with the narrow definition of law I am not in sympathy since they are apparently based upon premises, which it seems to me reason denies.

It is, from my point of view, illogical to call a body of individuals "sovereign," who by law possess a right to announce and do announce their collective will in the form of public laws, when another body of individuals within the same state possess the physical power to disobey such laws without liability to punishment. As I have indicated already, the obedience of the stronger is a voluntary act on their part, not an act of those possessing the legal right to will. Manifestly the real energy is not the law, but the power to enforce it.

Whence comes the legal right to exercise sovereignty? Who utters the creative law? Would those who follow in Austin's footsteps, deny that the right comes from law, and that the law comes from the political superior, and that political superiority comes from possession of the legal right to exercise sovereignty? So we go round the circle and return to our starting point like one lost in a forest.

Let us seek another way out of the difficulty. Assume, if you cannot agree, that sovereignty is the supreme physical power in a state. Law, upon that assumption, is the announced will of the possessors of the sovereignty. Sovereignty is the energizing force behind the law. It is in no sense a creature of law nor a concept of law, since it existed before law. The legal right to announce the will of those, who possess the sovereignty, may be retained by them or delegated to agents. But such legal right, like all other legal rights, is created, continued and destroyed at the will of the possessors of the sovereignty.

There is in this theory no mystery of creator and creature united in the same concept; no endless chain of cause and effect; no seeming contradiction; no paradox to be explained. It appears to me a practical working theory. It is dependent upon

the definition of sovereignty and a due recognition of the part sovereignty, as so defined, plays in our political and legal systems.

Briefly to recapitulate: There is in a modern political state, as in a primitive community, an irresistible energy which can control all human conduct within the state. This irresistible energy is superior physical might which has no limitations other than those inherent in human nature. This superior physical might confers upon its possessor or possessors the power to compel obedience to his or their will. This dominant will is expressed by action or by command. The supreme coercive physical power I would define as *sovereignty;* the expression of the dominant will of its possessor or possessors I would define as *law.*

Sovereignty, so defined, is a natural product of human association affected by the desire for its continuance. Law, in any but an artificial sense, is the mental product of the possessor of the sovereignty. Thus, effective rules of human conduct (and they are the only ones worthy of consideration), whether they apply to individuals or to states, depend ultimately upon paramount human energy or sovereignty, which, though founded in nature, seems to me, not only an appropriate, but an essential, term in international law as well as in constitutional law.

In this discussion I have not attempted to introduce a novel definition of sovereignty but rather to restate an old one and apply it to modern political conditions. I have endeavored to consider it from the practical standpoint regardless of any differentiation between political and legal theory. I have sought in a general way to test the reasonableness of the definition by applying it to political phenomena, with which we are all familiar, and by considering the relation between actuality and legal fiction.

As stated at the outset, I have been compelled to avoid a review of authorities. By following this course the consideration of the subject has been incomplete and, therefore, unsatisfactory. I realize this; and present this paper only by way of suggestion from one, who has found certain theories, which have been advanced by some of our philosophers, weakened or rendered imperfect by a concept of sovereignty, which is artificial and impracticable when applied to actual fact.